**North West Rural Electric Cooperative *and* David James Svoboda.** Case 18–CA–150605

July 19, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On September 28, 2016, Administrative Law Judge Thomas M. Randazzo issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge that the Respondent enforced Policies C-6 and C-9 by citing them as a basis for Svoboda's discharge. As an initial matter, we note that the complaint alleges that the Respondent enforced the policies in violation of Section 8(a)(1), and the General Counsel consistently maintained this position throughout the proceeding. At the outset of his decision, the judge acknowledged these allegations and ultimately found the violations. We thus find his statement in the analysis section of his decision that the policies were not alleged to have been applied to restrict Section 7 activity to be an inadvertent error. In agreeing with the judge's findings of the violations, we rely on the testimony of Manager Lyle Korver that Svoboda was discharged pursuant to these policies, and on the credited evidence that Supervisor Douglas Alons told Svoboda when he was discharged that the Respondent had "policies in effect" prohibiting his Facebook post. Accordingly, we find that the Respondent applied Policies C-6 and C-9 to restrict Section 7 activity, thereby violating Section 8(a)(1) and rendering the policies unlawful. See *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 (2017) (citing *Hitachi Capital America Corp.*, 361 NLRB 123, 125 (2014)).[4]

[1] The Respondent has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

We agree with the judge, for the reasons he states, that Svoboda's Facebook post was concerted activity and for the purpose of mutual aid or protection. As a result, we find it unnecessary to pass on his additional finding that Svoboda's discussion about safety in the electrical lineman industry was "inherently concerted." Further, in adopting the judge's finding that Svoboda's Facebook post did not lose statutory protection, we note that no party has excepted to the judge's application of the tests set out in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966), or *Pier Sixty, LLC*, 362 NLRB No. 59 (2015), enfd. 855 F.3d 115 (2d Cir. 2017). In adopting the judge's finding that Svoboda's Facebook post was concerted activity, Member Emanuel relies only on the judge's alternative rationale that "Svoboda's group Facebook discussion with statutory employees of other employers was aimed at improving the terms and conditions for all employees in the [lineman] industry." He finds it unnecessary to pass on the judge's rationale that "since Svoboda raised his workplace safety concerns in a group forum that included some of his coworkers, his comments were intended, at least in part, 'to initiate or to induce or to prepare for group action' in support of his position on those safety issues that he previously raised with management." Like his colleagues, he also finds it unnecessary to pass on the judge's finding that Svoboda's discussion about safety in the electrical lineman industry was "inherently concerted." In Member Emanuel's view, the Board's "inherently concerted" line of cases should be reconsidered.

[2] We affirm the judge's conclusion that the Respondent violated Sec. 8(a)(1) by discharging Svoboda for his Facebook post. In so doing, we note that no party excepts to the judge's application of *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted). In agreeing with the judge that the General Counsel met his initial burden, we additionally find that the Respondent's pretextual reasons for Svoboda's discharge warrant an inference of animus. See, e.g., *DHL Express (USA), Inc.*, 360 NLRB 730, 730 fn. 1 (2014).

Member Emanuel agrees with his colleagues that the Respondent violated Sec. 8(a)(1) by discharging Svoboda. He does not agree, however, that the Respondent separately violated Sec. 8(a)(1) by informing Svoboda that he was discharged for his protected Facebook post. In Member Emanuel's view, "[m]erely advising employees of the reason for their discharge is 'part of the res gestae of the unlawful termination, and is subsumed by that violation.'" *Triple Play Sports Bar & Grill*, 361 NLRB 308, 316 fn. 2 (2014) (Member Miscimarra, dissenting in part) (quoting *TPA, Inc.*, 337 NLRB 282, 285 (2001) (Chairman Hurtgen, dissenting in part)), enfd. mem. 629 F. App'x 33 (2d. Cir. 2015).

[3] We shall modify the judge's recommended Order to conform to the violations found herein and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[4] Member Emanuel agrees that the Respondent violated Sec. 8(a)(1) by applying Policies C-6 and C-9 to restrict Sec. 7 activity. He recognizes that under extant Board precedent, the application of a policy to restrict Sec. 7 activity renders the policy itself unlawful, and the remedy for such a violation is to order the employer to rescind the policy. See, e.g., *Cayuga Medical Center*, supra; *Hitachi Capital*, supra. He will apply that precedent here for institutional reasons. However, he does not agree with that precedent and believes that it should be reconsidered in a future appropriate case. In his view, a facially neutral rule remains facially neutral even if it is unlawfully applied, and ordering that the Respondent rescind a lawful rule is not an appropriate remedy. See *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115,

Based on the foregoing, we find it unnecessary to pass on whether the policies are unlawful because they are facially invalid or whether Svoboda's discharge pursuant to these policies violated the Act based on *Continental Group, Inc.*, 357 NLRB 409 (2011), as such findings would not materially affect the remedy.

ORDER

The National Labor Relations Board orders that the Respondent, North West Rural Electric Cooperative, Orange City, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) Telling employees that they have been discharged because they engaged in protected concerted activities.

(c) Maintaining or applying Policy C-6 and Policy C-9 to restrict employees' Section 7 activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Svoboda full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Svoboda whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate David Svoboda for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of David Svoboda, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Rescind Policy C-6 and Policy C-9.

(g) Furnish employees with inserts for the current employee conduct policies that (1) advise that the unlawfully applied policies have been rescinded, or (2) provide lawfully worded policies that will not be applied to restrict employees' Section 7 rights on adhesive backing that will cover the unlawfully applied policies; or publish and distribute to employees revised employee conduct policies that (1) do not contain the unlawfully applied policies, or (2) provide lawfully worded policies that will not be applied to restrict employees' Section 7 rights.

(h) Within 14 days after service by the Region, post at its Orange City, Iowa facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

slip op. at 13 fn. 12 (2016) (Member Miscimarra, concurring in part and dissenting in part); *Good Samaritan Medical Center*, 361 NLRB 1294, 1297 fn. 14 (2014) (separate opinion of Members Miscimarra and Johnson), enf. denied 858 F.3d 617 (1st Cir. 2017).

Dated, Washington, D.C. July 19, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT tell any of you that you are discharged because you engaged in protected concerted activities.

WE WILL NOT maintain or apply Policy C-6 or Policy C-9 to restrict you in the exercise of the rights listed above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the date of this Order, offer David Svoboda full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Svoboda whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate David Svoboda for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of David Svoboda, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind Policy C-6 and Policy C-9.

WE WILL furnish you with inserts for the current employee conduct policies that (1) advise you that the unlawfully applied policies have been rescinded, or (2) provide lawfully worded policies that will not be applied to restrict your exercise of the rights listed above on adhesive backing that will cover the unlawfully applied policies; or publish and distribute to you revised employee conduct policies that (1) do not contain the unlawfully applied policies, or (2) provide lawfully worded policies that will not be applied to restrict your exercise of the rights listed above.

NORTH WEST RURAL ELECTRIC COOPERATIVE

The Board's decision can be found at www.nlrb.gov/case/18-CA-150605 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

*Abby E. Schneider, Esq.* and *James L. Fox, Esq.,* for the General Counsel.
*James M. Walters, Esq.* and *Fred L. Dorr, Esq.,* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Sioux City, Iowa, on January 26–27, 2016. David James Svoboda, an Individual (the Charging Party) filed a charge on April 21, 2015,[1] and the General Counsel issued a complaint and notice of hearing in this matter on October 5, 2015.[2]

The complaint alleges that North West Rural Electric Cooperative (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging the Charging Party on December 8, 2014, because he engaged in concerted activities for the purpose of mutual aid and protection by posting comments regarding his concerns about safety on a Facebook page devoted to issues of workplace safety in the electrical industry. In addition, the complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing Conduct Policy C-6 which instructs employees to use the Respondent's internal grievance procedure to resolve complaints or grievances, thereby prohibiting employees from utilizing other methods to resolve such complaints or grievances, including by discussing them with one another; and Conduct Policy C-9 which prohibits or interferes with employees' rights to discuss and disclose wages and other terms and conditions of employment. The Respondent, in its answer, denied that it violated the Act as alleged.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent is an Iowa cooperative with an office and place of business in Orange City, Iowa, where it is engaged in the distribution of electricity.[5] The Respondent admits, and I so find, that annually in conducting its business operations described above, it purchased and received goods valued in excess of $50,000 directly from points located outside the State of Iowa and derived gross revenues in excess of $250,000.

It is also admitted, and I so find, that Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### *A. The Facts*

##### 1. Background

The Respondent is an electricity distribution cooperative which purchases electricity and delivers it to its rural customers. The cooperative, with its main office in Orange City, Iowa, serves a four-county area in northwest Iowa, and is divided into 4 districts: District 1 (Orange City), District 2 (O'Brien County), District 3 (Plymouth), and District 4 (Ida). Lyle Korver is the Respondent's CEO and general manager, Douglas Alons is the operations director, and Derrick Haak is the assistant operations director. The Respondent's districts each have a line crew. The lineman crew involved in this case is the Orange City, Iowa crew in District 1.

The Respondent employs electrical workers or "linemen," who are responsible for the day-to-day maintenance of the electrical distribution system, which includes the new construction of power lines and service calls to deal with electrical problems. Much of the work involves the setting of power line poles and installing or repairing the electrical wires either by climbing the poles or by using aerial baskets or buckets on trucks. Linemen work with live electrical wires containing 7200 volts of electricity. It is undisputed that lineman work is inherently dangerous. Touching a live electrical wire can result in injury, ranging from shock to serious injury or death. The Respondent conducts monthly safety meetings for its employees in which topics such as close calls are discussed in the Respondent's service area or in the surrounding areas covered by other cooperatives or companies.

The Respondent has had a collective-bargaining relationship with the International Brotherhood of Electrical Workers, Local Union No. 231 since 1966. (R. Exh. 2.) That relationship has been embodied in successive collective-bargaining agreements, the most recent of which is effective from August 1, 2015, to July 31, 2019. (Tr. 226.) The previous collective-bargaining agreement which was in effect at the time of David Svoboda's discharge was effective from August 1, 2012, to July 31, 2015. The collective-bargaining agreement describes the bargaining unit as consisting of:

> All maintenance and construction employees, including material handlers, warehousemen, service men, customer service technicians, boom truck operators, groundmen, tree trimmers, lead linemen, linemen, apprentice linemen, electricians and foremen; excluding line superintendent, office clericals,

[1] An amended charge was filed by the Charging Party on June 10, 2015.

[2] All dates are 2015, unless otherwise indicated.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

The Respondent filed a motion to correct the transcript on March 1, 2016. The motion requested that 28 mistakes in wording or spelling be corrected. The General Counsel indicated in writing that he had no objection to the motion. On that basis, the Respondent's motion to correct the transcript is granted.

[4] In making my findings regarding the credible evidence, including the credibility of the witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony, and the inherent probabilities based on the record as a whole. In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony.

[5] The complaint, which alleged that Respondent was engaged in both the "generation and distribution of electricity," was amended at trial to allege only the "distribution of electricity."

guards and supervisors as defined in the National Labor Relations Act, as amended. (R. Exh. 2.)

At the time the 2012–2015 collective-bargaining agreement was negotiated, Svoboda served as a union steward, and along with the local union president, was signatory to that collective-bargaining agreement as one of the Union's "authorized representatives." (R. Exh. 2, p. 17; Tr. 107.) There is no evidence, however, that Svoboda held any position with the Union at the time of this discharge in December 2014. In fact, Svoboda held a nonunit position at the time of his discharge.

2. The Respondent's employee conduct policies

The Respondent maintains several employee conduct policies. In particular, Policy No. C-6 and Policy No. C-9 are relevant to this proceeding, and it is undisputed that those policies were in effect at the time of Svoboda's discharge. Policy No. C-6 is titled "Attitude, Spirit and Cooperation," and Policy No. C-9 is titled "Personal Conduct." (GC Exh. 11.) Respondent Policy No. C-6, which in part involves employee methods to resolve complaints or grievances, states in its entirety:

SUBJECT: Attitude, Spirit and Cooperation

I. OBJECTIVE

To encourage cooperation and a positive attitude between employees and their supervisors, the member-consumers and other employees.

II. POLICY CONTENT

Cooperative employees are expected to perform their jobs in a courteous and professional manner. Employees are expected to use the Cooperative's problem-solving procedure to resolve misunderstanding or disagreements that could otherwise affect the employees' ability to do their jobs in an efficient and positive manner.

III. PROVISIONS

Bad attitudes, griping, complaining, rudeness, surliness and so forth are characteristics that everyone occasionally exhibits. However, when such behavior continues on a day-to-day basis, it can cause conflicts and disruptions that result in inefficient job performance and, if exhibited in the presence of the Cooperative's member-consumers, a loss of goodwill.

The Cooperative recognizes that everyone has an occasional bad day, but rude or surly conduct will not be tolerated from anyone on a consistent basis. Employees should use the grievance procedure (Policy No. 36)[6] when they have complaints about their working conditions. Even when complaints cannot be resolved to their satisfaction, employees are expected to perform their jobs in a cooperative, courteous, and professional manner. The failure to do so may result in discipline, including termination.

IV. RESPONSIBILITY

The General Manager, through the department heads, shall be responsible for the administration of this policy.

(GC Exh. 11(a))

[6] Neither a copy of Policy No. 36 nor a description of that policy is contained in the record.

In addition, Respondent's Policy No. C-9 addresses employees' rights to discuss or disclose certain terms and conditions of employment. Policy No. C-9 states in its entirety as follows:

SUBJECT: Personal Conduct

The success of North West REC (NWREC) depends upon the confidence and respect employees generate while at their workstations, representing NWREC at a business function, or in social gatherings. You must work with others, to comply with the rules and regulations of NWREC, to adjust to change, and to promote the best interests of NWREC. Where conduct does not meet expectations, corrective action, which could include termination, will take place.

It is impossible to provide an exhaustive list that identifies every type of conduct that may result in corrective action or termination. However, in order to offer you some guidance, the following list provides examples of conduct that may result in corrective action up to and including discharge: poor or inefficient job performance; poor attitude; failing to keep the premises clean and in a sanitary condition; dishonesty; failing to maintain effective working relationships with others; causing or contributing to conflicts between employees; failure to follow instructions; sexual and other forms of harassment; discrimination or misconduct; willful disregard of the employer's policies and procedures; disclosure of confidential information; possession, distribution, sale, use or being under the influence of alcoholic beverages or illegal drugs while on NWREC premises or work-sites or while on duty, or while operating a vehicle leased or owned by NWREC; misconduct (such as theft, falsification of employment or other NWREC records, assault, insubordination, use of profanity, fighting, making threats, possession of firearms while on NWREC business or on NWREC premises, and defacement of property); excessive and unnecessary use of NWREC supplies, especially for personal purposes; excessive absenteeism or tardiness; and failure to report for, or call in, to work.

The general prohibition of possession of firearms notes herein may be waived, under limited circumstances, on written grant by NWREC's CEO/Manager of an application for waiver first presented in writing by an employee. Any such waiver application shall outline the reason for the request, confirm the employee lawfully possesses such firearm and be approved in writing according to limitations or conditions which the CEO/Manager may apply.

3. David Svoboda's employment as a lineman with the Respondent from 2007 to 2014

David Svoboda began working for the Respondent as an apprentice lineman in February 2007. Doug Alons served as Svoboda's direct supervisor while he was employed by the Respondent. While Svoboda previously completed apprenticeship training at a previous job with a different company in another state, the Respondent required all of its new employees to complete its own 1-year probationary period before becoming journeyman linemen. Svoboda received two performance reviews while an apprentice that contained overall positive comments by management about his work, and his managers even

recommended that he advance early in the apprenticeship program. (R. Exhs. 3 and 4.)

In an "apprenticeship review" for Svoboda conducted in September 2007 by then assistant manager, Darwin Dirks, it was noted that the Respondent found Svoboda "to be very proficient in all aspects of line work," and while taking over for a coworker who was recuperating, Svoboda did "a good job of operating the basket and performing the necessary aerial work." (R. Exh. 3.) Dirks also provided some constructive feedback, noting that Svoboda's supervisor had to inform him to "heed warnings from other linemen and stay clear of poles when hotline work is being performed above," and even though they were glad to consider Svoboda's offers on how to perform some work differently, he needed to "be open to accepting [the Respondent's] ways of doing things." (R. Exh. 3.) Dirks then stated it was management's recommendation that Svoboda be promoted to the 8th step of the apprentice program, and he noted that Respondent would even consider "shortening [that] step" for Svoboda. (R. Exh. 3.)

In a second apprenticeship review for both Svoboda and fellow lineman, Phil Elgersma, Dirks stated that Doug Alons was "impressed with [Svoboda's] work ethic and the fact that he is always ready to get to work in the morning without being told," and that he should "not be too eager in his line work and sacrifice safety in the process." (R. Exh. 4.) Dirks stated that Svoboda was "doing a good job and work[ed] well and [got] along with [his] fellow employees." After Svoboda's first year with the Respondent, based on his overwhelming positive reviews, he was advanced to journeyman lineman. (R. Exhs. 3 and 4.)

The record establishes that Svoboda was issued several disciplinary warnings over his 7 year career with the Respondent. On June 10, 2011, he was issued his first warning for an "unsafe operation by standing on the forks of the fork lift to work on a garage door without using a work platform and fall protection." (GC Exh. 2.) Also, Svoboda was issued a second warning dated September 25, 2012, for his failure to stay in the local area while he was on call, which resulted in a longer than necessary outage due to the difficulty in getting other employees to respond to fix the outage. (GC Exh. 3.) The discipline states that Svoboda will have to "demonstrate the ability to get along well and work in a cooperative effort with his fellow employees" and "make sure he is in the area and available for outages when on call." (GC Exh. 3.)

In December 2013, after Phil Elgersma was chosen over Svoboda for the lead lineman position on the District 1 crew, Svoboda requested a meeting with Korver and Alons wherein he expressed his concerns for being passed over for that position. In a memo drafted by Korver concerning that meeting, Korver recorded that he and Alons informed Svoboda that he had a "past history of not cooperating at times and a bad attitude." (GC Exh. 5, p. 1.) They informed Svoboda that "his attitude and cooperation need to change significantly." (GC Exh. 5, p. 2.) Finally, Korver stated:

> I made it very clear to Dave that we didn't want to terminate his employment, but based on his previous warnings and how things were going, we were very close. Either he needs to show significant improvement in his attitude and cooperation or he will be terminated as an employee of North West REC. (GC Exh. 5, p.2).

At the hearing in this case, Svoboda did not dispute the issuance of the above-mentioned disciplinary warnings on June 10, 2011, and September 25, 1012, or that he was informed by Korver on December 18, 2013, that his next infraction could result in his discharge.[7] However, despite those warnings, Svoboda credibly testified that for the time period from December 2013 until December 2014, he had no instances in which his supervisors or managers discussed an alleged bad attitude with him. (Tr. 31–32.) There is also no evidence that Svoboda was issued any further warnings or discipline during that time period.

### 4. Svoboda is selected for the position of GPS & Staking Technician in October 2014

Svoboda worked as a lineman until October 2014, when he applied and was selected for the newly created position of GPS & Staking Technician. The new position was a full-time position at the same pay he was earning as a lineman, but the position was not included in the collective-bargaining unit. In his new position, Svoboda worked "staking" lines, using GPS (Global Positioning System) to determine where utility poles should be installed. He then staked the lines, determining the pole size, span lengths of utility wires, and determining the type of fixtures to be uses to install the lines. (Tr. 250–251.) The staking work was previously performed by managers Alons and Haak, and the position was created to help those managers "streamline" their work. (Tr. 250–252.) In an email from Korver dated October 13, 2014, to a number of Respondent's employees, including managers, directors, coordinators, and advisors, Korver announced that "we selected Dave Svoboda to fill the new Staking & GPS Technician position. Dave will start this position in the next couple of weeks so that he can work with the Global Mapping Solutions crew in continuing the big project we have going with completing a GPS inventory of our system." Korver went on to state that he was pleased to fill the position with a current employee and he thanked the other employees who expressed an interest in the position as well. (R. Exh. 6.)

As a lineman, Svoboda worked with a crew on a daily basis. However, in the new position of GPS & Staking Technician, he only worked with a crew approximately half of his time at work. In addition, while he continued to work Monday through Friday, he only worked the weekends when there were emergency calls or outages. Phil Elgersma, the Orange City District 1 lead lineman, testified that when Svoboda was selected for the GPS & Staking position, the crew worked with him only "occasionally" and "a lot less," and he would work with the crew "only on some days." (Tr. 325.) Svoboda worked for approximately 2 months as the GPS & Staking Technician without incident until December 8, 2014, when he was discharged.

[7] There is also no allegation or evidence that the two disciplinary warnings, or the warning on December 18, 2013, were issued by the Respondent for discriminatory or unlawful reasons.

5. The Linejunk Facebook page serves as an on-line forum for linemen and electrical workers

"Linejunk" is an on-line forum that started in 2013 with a website and a Facebook page that pertains to linemen and electrical workers. (Tr. 33.) Its Facebook page states that it was started in 2013 to bring recognition to the trade with apparel, but has grown "to also provide information about and to the trade." (GC Exh. 8.) Linejunk describes itself as "the most followed page in the industry" and "the premiere place to go if you are a lineman." (GC Exh. 7 and 8.) The administrators of the Linejunk Facebook page invite people to "post what [they] want, when [they] want." (GC Exh. 8.) The Facebook page shows that at the time of the hearing in this matter, nearly 65,000 people "liked" the Linejunk page. By "liking" the Facebook page, they clicked a button on the page indicating they "like" it, and by doing so, updates from the page show up on their personal newsfeeds which are on the first screen they see when they sign on to Facebook.com. (GC Exh. 7; Tr. 41–44.)

On the Linejunk Facebook page, the right side contains "newsfeeds." (GC Exh. 7; Tr. 37–41.) While the administrators of the Facebook page can choose to change the photographs at the very top of the page and the descriptions on the left-hand side of the page from time to time, the news feeds are constantly changing as the Facebook users post comments and pictures. Svoboda credibly testified that the newsfeeds on the Linejunk Facebook page pertain to "safety concerns" and "pictures that other linemen would have posted." (GC Exh. 7; Tr. 39.) Visitors to the Linejunk Facebook page are able to post comments or pictures on the newsfeeds themselves, or they can submit posts for the page's administrator to publish on the newsfeed. The updates to the page would trigger a new newsfeed item for the page's followers, and Svoboda viewed the Linejunk Facebook page on a daily basis because it showed on his Facebook newsfeeds. (Tr. 56.) You do not have to be a member or follower of the Linejunk page to see the Linejunk newsfeeds because in addition to the people who "like" the page, the general public can view it. (Tr. 43.)

If you "like" a page on Facebook, other people can see that you "liked" it. Svoboda testified that some of his coworkers also "liked" the Linejunk Facebook page. Svoboda's Facebook page alerted or notified him that Luke Lathrop, Mike Berkenpas, and Gabe Roetman, three of his fellow linemen who were his Facebook friends, "liked" and followed the Linejunk page. (Tr. 42–45.) In addition, Elgersma testified that he "liked" the Linejunk Facebook page, so Facebook notified him of other coworkers who "liked" it. (Tr. 314–315.) Elgersma testified that besides Svoboda and himself, his other coworkers who "liked" the Linejunk page were Luke Lathrop, Scott Wubben, and Mike Berkenpas. (Tr. 340.) Svoboda testified that for the period of time around 6 to 8 months before his termination in December 2014, he discussed the Linejunk Facebook page with his coworkers, in particular, Luke Lathrop and Alex Jungers. The topics he discussed with them were "different safety concerns" or pictures that were posted. (Tr. 57.)

6. The administrator of the Linejunk Facebook Page posted a safety inquiry on December 1, 2014, and Svoboda posted a response to that inquiry on December 2, 2014

Svoboda testified that he viewed the Linejunk Facebook page daily. At the time he frequented the Linejunk Facebook page, it was typical for a Linejunk administrator to post pictures and conversation starters on a daily basis. On December 1, 2014, at 8:53 p.m., a Linejunk Facebook page administrator posted a question to the Linejunk Facebook community or followers on behalf of someone who claimed to be a lineman with 36 years of experience. That lineman stated that he had been asked to be part of a safety team and he wanted to know why so many accidents were occurring. (GC Exh. 5; Tr. 45–46; 53.) The posted safety inquiry states:

> Linejunk
> Dec 1 at 8:53 pm
> i have a question to ask…First, i have been a lineman for 36 years, the last four years i have been a line foreman, so i do know line work, i have been ask to be a part of a safety team, to try and figure out why there are so many accidents. I have been following **Time for a Change** like many of you have, were all reading about all the accidents, why are they happening????so here is my question to you. How do we fix this, what do we need to do to prevent accidents? i know a few will say that the company pushs us, well that may be, but if you think its unsafe, then why did you do it, so I don't want to get in any pissing match with anyone, i would just like to know your ideas on how we can stop all the accidents, is it lack of training, is it inexperience ect. Your thoughts will be appreciated….(D) (GC Exh. 5) (spelling, punctuation and emphasis in the original)

The record reveals that the bolded text "Time for a Change" is another Facebook page that existed as of December 2014, which like Linejunk, focused on safety concerns in the lineman and electrical field. The Linejunk administrator set up a link so that if a viewer clicked on "Time for a Change" in the posting, it would bring the viewer to the "Time for a Change" Facebook page. (Tr. 51.) At some point between December 2014 and the date of the hearing in this matter, the exact date of which is unknown, "Time for a Change" changed its name to "Linemen Take a Stand for Safety." (Tr. 51; GC Exh. 9.) Even though its name changed, the description of the Facebook page still stated: "With the overwhelming amount of deaths in the Lineman industry it is time to make a change." (GC Exh. 9.) Thus, both the "Linejunk" and "Time for a Change" (and subsequently "Linemen Take a Stand for Safety") Facebook pages provided safety information and a forum for conversations about safety for linemen. (Tr. 52; GC Exhs 7 and 9.) At the time of the hearing in this matter, the "Linemen Take a Stand for Safety" Facebook page had 5242 people who "liked" it. (GC Exh. 9.)

The Linejunk Facebook administrator's question posed a conversation starter regarding safety, and it had approximately 110 comments that were posted by people in response, and it had 77 "likes." (Tr. 60; GC Exh. 14.) One of those people was Svoboda, who posted a response on December 2, 2014, at 6:30 p.m., approximately 22 hours after the Linejunk administrator posted the original question. Svoboda credibly testified that he

read at least some of the comments to the administrator's original question before he posted his comment. (Tr. 56–59, 68, 84.) He described the comments he read as "trending" towards crew size and the amount of workers in the area, which related to "the safety of the linemen that are in the air and fellow crew members." (Tr. 72–73.) Svoboda testified that he posted his comment in two parts because he exceeded the character limit for a single post. Svoboda's posted response with the exact spelling and punctuation (or lack of punctuation) on the Linejunk Facebook page stated as follows:

> I agree with most comments been in the trade 11 years started with iou and got my ticket was trained by the "old" guys then moved back home to a coop and what a goat bang it has been I will never forget the guys that brought me up they were the real deal the brotherhood that was compared to me at 31 being the oldest jl of our 6 man crew and I use 6 man crew loosely most it's 3 out doing all work a jl or two and apprentice sometimes lead man one man In the air all the time I have brought everyone through there apprenticeship except my lead lineman who's 3 years younger I was In The Air all the time look down not a one would be looking up not even apprentice then I would get lip back when I would talk about it told management all the time these new guys need time in the air I can count on my damn hand how many times I have seen them do hot work. Again brought it up they agree nothing gets done biggest part now days is lack of experience one man in the air it all drove me out I got sick of fighting the guys took a staking job. Just last month.
>
> Lack of discipline, and having to care about others feelings Is why people get hurt I used probably the least amount of cover and like others have said it teaches you to keep your shit in a row and pay attention. Not to just go slopping around. That's my 2 cents. every accident I have heard of is o e man in the air and maybe one on the ground on maybe they are a few spans down stupid. (GC Exhs. 5 and 14.)[8]

There were posts to the administrator's original question both before and after Svoboda's post. There were also posted comments in response to those 100 responses, and some of those comments were posted by the Linjunk administrator on the Facebook page. (GC Exh. 14.)[9] Svoboda testified that his post was the first and last time he posted a comment on the Linejunk Facebook page. In addition, Svoboda testified that after his post, he stopped using Facebook. (Tr. 50.) He also testified that after his discharge he called Linejunk and "let them know that because of a post that was on their page, there was a termination," and the Linejunk administrator then removed the entire conversation from its Facebook page. (Tr. 72.)

While portions of Svoboda's posted comments are somewhat cryptic in nature, Svoboda clarified and explained at the hearing in this matter what some of the phrases meant. In this regard, he testified that the phrase "started with iou" meant he started working at an "investor owned utility" named Aquila in Kansas, and "got my ticket" meant the International Brotherhood of Electrical Workers qualified him as a journeyman lineman while working there. (Tr. 118–119.) According to Svoboda, "the old guys" referred to the older generation of linemen with 30 or more years of experience, who trained him in his apprenticeship program in Kansas. (Tr. 53; 120.) The "coop" he "moved back home to" referred to the Respondent, and the "goat bang" was a term for "uncertainty of issues" as he believed some of Respondent's practices did not "jive together" all the time and instead were "kind of a mess." (Tr. 54; 120.) The phrase "Me at 31 being the oldest jl" referred to the fact that at 31 years old, he was the oldest journeyman lineman on the crew. (Tr. 120–121.)

Svoboda's comments also referenced safety issues or concerns. He credibly testified that the phrase "6 man crew loosely" referred to the fact that most of the time the six man crew was split into two 3 man crews, and he believed the 6 man crews were safer than the 3 man crews. (Tr. 121.) Svoboda testified that when "one man was in the air" it was safer to have more of the crew on the ground serving as "eyes" to "make sure that you are in the right place." (Tr. 55; 121.) The comment that he "told management all the time these guys need time in the air I can count on my damn hand how many times I have seen them do hot work" meant he believed that for practices to be safe, the apprentice linemen "needed to be in the hot zone getting hot work with another journeyman lineman" in the lift bucket or basket. (Tr. 122.) Svoboda testified that he did not believe the apprentice linemen were getting enough experience in the air in the buckets or with "hot work" (around energized conductors where linemen are at risk of contact with the electrical current) before they were being certified as journeymen linemen. (Tr. 54; 122–128.) He testified that he believed the apprentice linemen needed "more time in the air" to get experience so that when they became journeymen linemen, "you could fee[l] comfortable having them do the work with not having to constantly be looking over their back and telling them what to do." (Tr. 123–124.) Svoboda credibly testified that by these comments he was advocating for better safety, explaining:

> Because they need more time. That's the whole point of the apprenticeship program is to have them be able to have that time to get involved. That's why you're with another journeyman lineman in the air. You aren't a journeyman lineman just because [a] paper says you're a journeyman lineman. You're a journeyman lineman because you came through the ranks of an apprenticeship and you understand how to conduct yourself in situations that can occur. (Tr. 126–127.)

Svoboda testified that in his apprenticeship in Kansas he "went

[8] GC Exh. 5 is an image of the Linejunk Facebook administrator's safety inquiry post and Svoboda's posted response. GC Exh. 14 (a)–(q) is a printout of that same post on page (e), and all of the posted comments in response.

[9] With regard to GC Exh. 14 (a)–(q), the parties stipulated that: (1) the original post was made by the administrator of Linejunk; (2) Svoboda made a response to the original post that was in two parts or paragraphs (on page (a) of the exhibit) that is displayed in backward order—the larger paragraph of Svoboda's response was actually typed first and was followed by the smaller paragraph; (3) there were posts made in response to the administrator's original question, both prior to and after Svoboda made his post; and (4) the posts in GC Exh. 14 (a)–(q) are representative of the posts that appeared in that chain responsive to the original post by the Linejunk Facebook page administrator. (Tr. 158–160.)

through a 2,000-hour program" with "1,500 hours of hot time," which he believed provided more safety than the Respondent's apprenticeship program because the Respondent's program did not have a "hot hour basis."[10] (Tr. 127–128.)

Svoboda also testified that his statement "got sick of fighting with the guys" referenced his work-related disagreements with some of the crew between the way Phil Elgersma ran the crew when he was in charge, as compared to the way he (Svoboda) ran the crew when he was in charge. (Tr. 128–129.). His statement "Just last month" is connected with "took a staking job," which refers to the fact that in October 2014 he started working in the staking position which is a non-bargaining unit position, and then only worked occasionally with the line crew. (Tr. 146; 152.) In addition, he testified that the phrase "lack of discipline" referred to the lack of self-discipline by the apprentices, and "having to care about others' feelings" referenced that "you couldn't speak up and tell [the other crew members] that, hey, look, you're not doing it right." (Tr. 147) Svoboda's post on Linejunk did not mention the name of his employer, nor did it identify his coworkers.

7. Svoboda's posted comments in response to the Linejunk Facebook administrator's question regarding safety were similar in nature to the other posted comments in that conversation and to other discussions about lineman safety that occur in the media

Svoboda's comments in his post were not unlike many of the other posted comments in that conversation. Many of the over 100 other posted comments in that Linejunk conversation similarly addressed safety concerns like Svoboda's, such as issues pertaining to linemen crew size, the number of workers in an area, lineman training, and other matters concerning "the safety of linemen in the air and fellow crew members." (GC Exh. 14; Tr. 72–73.) Thus, the Facebook conversation was "trending" in the same direction as his post with regard to crew size and the amount of workers in an area. (Tr. 72.) For example, one posted comment by an individual to the administrator's question stated that "Going to a three man crew is total bullshit in my eyes. You always need a set of eyes on the ground doing nothing but watching his two brothers in the air." (GC Exh. 14(e).)

Svoboda's comments were not only similar in nature to the other posts in response to the conversation starter on safety, they were similar in nature to other comments posted on other websites and mentioned in other media articles dealing with lineman safety and the electrical industry. (GC Exh. 13.) The record contains a sampling of articles both in print and on the internet which establish that the electrical lineman industry is inherently dangerous and that there are safety concerns, and conversations and discussions about those safety concerns. (GC Exh. 13; Tr. 215–223.) In addition, Respondent CEO Korver testified that he was aware that discussions about lineman safety occur in the media, whether it was on the internet, in newspapers, or in magazines. (Tr. 298.) He also testified that the Respondent is always interested in improving workplace safety.

Svoboda's comments pertaining to safety were also nothing new to management or his coworkers. Svoboda had previously raised and shared some of the same safety concerns mentioned in his Linejunk Facebook post with his managers and coworkers throughout his employment with the Respondent. (Tr. 55–56.) He specifically talked about some of the accidents where one lineman was in the air and either none or just a few were on the ground. (Tr. 55.) He specifically brought up such safety concerns in daily work conversations and after the Respondent's safety meetings and he discussed such concerns with Supervisor Alons and coworker Luke Lathrop. (Tr. 56.) In addition, several of his coworkers he was friends with on Facebook "liked" the Linejunk Facebook page. (Tr. 56–57.) Svoboda testified that based on the conversations he had with his coworkers about safety, he believed his coworkers supported him on those safety issues. (Tr. 56.)

8. On December 3, 2014, Svoboda's coworkers provided the Respondent with a printed copy of his Linejunk Facebook post

The day after Svoboda posted his response to the Linejunk safety conversation starter, Phil Elgersma, the crew's lead lineman, delivered a printed copy of the Linejunk Facebook conversation to Alons before the crews were dispatched for work that morning. Alons testified that Elgersma told him the crew in District 1 had something they wanted to discuss with him and he handed him the printed Facebook conversation which included Svoboda's post. According to Alons, Elgersma was accompanied by the crew members, consisting of: Luke Lathrop, Al Jungers, Dustin Koele, and Brandon Bonnema. Elgersma told him that the crew had seen the Facebook post the night before and they talked among themselves, and if he did not have work for Svoboda, they asked that Alons not send Svoboda with the crew anymore because they "really want no part of working with him." (Tr. 171.) Elgersma also conveyed that the crew, referring to the post, "had the impression that [Svoboda] threw them under the bus." (Tr. 171.) Alons testified that Elgersma appeared upset and told him that Svoboda's post "put the Orange City crew and the whole organization in a bad light, and they took it from that . . . he was making the comments against all of them." (Tr. 178.)

Alons read the Linejunk Facebook post after Elgersma gave him the printed copy, and he then gave the printed copy to Haak, who also read it. (Tr. 172.) On Friday afternoon, December 5, 2014, Alons called Korver who was out of the office and told him about Svoboda's Facebook posting. In that call they discussed the Facebook post and how the crew brought it to Alon's attention. (Tr. 173.) Alons testified that he and Korver also discussed and referred "all the past warnings, both written and verbal," and that Svoboda "should have been aware that he was on his last, final warning." (Tr. 173–174.) Alons testified that at that time, they made the decision to terminate Svoboda. (Tr. 174.)

Elgersma acknowledged that he informed the Respondent of Svoboda's Facebook post, but some of his testimony contradicted that of Alons. While Alons testified that when Elgersma informed him about the Facebook post the crew was with him, Elgersma testified that in that meeting, he was "alone with Doug [Alons] in the office." (Tr. 325–326.) In addition,

[10] Svoboda described a "hot-hour basis" as "how many hot hours you needed to have before you were a qualified journeyman lineman." (Tr. 128.)

Elgersma did not testify that he said anything to Alons about Svoboda throwing them "under the bus." (Tr. 326.) Elgersma instead testified that he "just said [that he] got calls from the other guys last night, and [he] said if this is how [Svoboda] feels about us, you know, being how our job entails safety and respect . . . and we watch out for each other . . . we don't want to work with him anymore." (Tr. 326.) Elgersma testimony revealed that his desire not to work with Svoboda was not a recent feeling because for "several months" he and the crew members did not want to work with Svoboda. (Tr. 324.) He testified that sometimes the crew members would flip a coin to determine who would have to work with Svoboda. (Tr. 324.) However, the record establishes that since Svoboda took the staking job, he worked much less with the crew than he had before. In that regard, Elgersma testified that while in the staking job, Svoboda only worked "occasionally" with the crew, depending on the job. (Tr. 325.) He also testified that the crew ". . . worked with him a lot less then. . . ." (Tr. 325.)

Dustin Koele, one of the Orange City District 1 crew members, testified that he saw Svoboda's Linejunk Facebook post. Koele understood that the subject matter of the post was about safety, but he disagreed with Svoboda's "characterization of safety practices." (Tr. 349; 355–356.) In particular, he testified that "from a safety perspective" he disagreed with Svoboda's statement that "using less cover-up" was safer. (Tr. 349.) In addition, with regard to Svoboda's comment about "the ground man not looking up at the guy in the air," he testified that:

> It's kind of the thing we talk about right away when new guys get here, that that's kind of their primary job, as well as all of us that have been here. But, … that's one of their primary jobs … to pay attention to the guy in the air. If something looks unsafe, you say it, … whether it is or not, [you] bring it to our attention and go from there…. (Tr. 349)

Koele testified that Svoboda was not part of the line crew because he had the staking job, but he would sometimes help the line crew when he did not have staking work to do. (Tr. 351.) He specifically recalled only working with Svoboda one time after he took the staking tech position. (Tr. 353.) Nevertheless, Koele testified that he was present with the line crew when Elgersma provided Alons with Svoboda's post, and that after reading the post, he preferred not to work with Svoboda because he "ran all our names through the mud." (Tr. 350.) Koele, over the 3 1/2 years that he worked with Svoboda, requested "multiple times" not to work with him. (Tr. 354.) In fact, he testified that on approximately 15 occasions he indicated to his managers that he did not want to work with Svoboda. (Tr. 353.) Thus, Koele testified that his requests not to work with Svoboda occurred "long before" the Linejunk Facebook post, and such requests had nothing to do with the Facebook post. (Tr. 355.)

Svoboda testified that he had gotten along well with his coworkers on the line crew, and had on occasion gone out for beer with them, but after he posted his comments on the Linejunk Facebook page, "their demeanor towards him changed," and his coworkers appeared angry with him, in particular Koele and Lathrop. (Tr. 73–74; 143.) He testified that, at that time he did not know if his coworkers saw his post, but he suspected they did because they were "short" with him and appeared to not want to talk to him. (Tr. 74.) He testified, however, that a few days later, while outside of work, he asked coworker Alex Jungers if he saw the Linejunk Facebook post, and Jungers confirmed that he had seen it. (Tr. 74.)

### 9. The Respondent discharged Svoboda on December 8, 2014, approximately 1 week after he posted his comments on the Linejunk Facebook page

After Alons read Svoboda's Facebook post on Wednesday, December 3, 2014, he talked to Korver about it on Friday, December 5. Alons testified that he waited several days to talk to Korver because Korver was out of town and Alons believed he would return that week. On Friday, after Korver failed to return to the office, Alons contacted him by phone and discussed "the issue" of Svoboda's "Facebook post." (Tr. 173.) According to Alons testimony, they came to the conclusion that it was time for Svoboda's termination. (Tr. 180.) Alons testified that the decision was based on "a review of all the warnings that he's had over the years and attitude issues over the years….[a]nd it doesn't appear the pattern has changed…[s]o we decided to terminate." (Tr. 180–181.) Alons also testified that the decision was based on the "how the guys reacted to [Svoboda's post] and that they didn't want to work together anymore." (Tr. 181.)

On Monday, December 8, 2014, Alons and Haak met with Svoboda in the morning and held him over until after the crews were dispatched. According to Svoboda, in that meeting, Alons told him "it had been brought to their attention that [he] still had some harsh feelings with the cooperative that [he had] aired them on Facebook, and they had policies in effect," and then Alons asked for his keys. (Tr. 77.) Alons simply testified that he informed Svoboda that his Facebook post had been brought to his attention, that it was "all negative," and that he made the post in a forum he knew his coworkers were on. (Tr. 175.)

Alons testified that after Svoboda's discharge, there was no written notation made of his discharge meeting. (Tr. 181.) However, that testimony was contradicted by Respondent's own evidence of a memorandum dated December 11, 2014, entitled "Termination of Employment of Dave Svoboda." (R. Exh. 1; Tr. 182.) That document was drafted by Korver and it was signed by Korver, Haak, and Alons. In the memo, Korver stated:

> Doug [Alons] reported that we had experienced another issue with Dave Svoboda. Several of the line crew had made Doug aware of a social media post by Dave one night this week and they were quite upset about it. Doug said that the post was negative to the Cooperative and to some of the line crew. He was very concerned about this and not being able to trust Dave in his new position as GPS and Staking Technician. Doug also mentioned that one of the Lead Lineman (sic) had again told him that he did not want to have Dave with the crew anymore.
>
> Based on our previous warnings to Dave, I indicated to Doug that he really gave us no choice – we would need to terminate his employment. (He had received several previous verbal warnings about his bad attitude and lack of cooperation with

other employees and two written "final warnings" – one in 2012 and one last December.) (R. Exh. 1.)

The memo further stated that they agreed Alons and Haak would meet with Svoboda on Monday morning and "terminate his employment immediately for his continued bad attitude, negative comments toward our organization and his fellow employees, and the concerns that have been raised of our linemen not wanting to work with him." (R. Exh. 1.) The memo also stated that Alons and Haak met with Svoboda on December 8 and "[t]hey mentioned that it had come to their attention that Dave had made a negative post on social media and this was another demonstration of Dave's bad attitude toward the Cooperative and his fellow employees and it causes conflict and mistrust." (R. Exh. 1.)

As Alons escorted Svoboda to his locker to remove his belongings, Svoboda asked Alons if he saw his Facebook post, and Alons said that he had seen it. Finally, Svoboda ask him if his Facebook post included any new information that he (Svoboda) had not already shared with the Respondent, and Alons stated that it had not. (Tr. 78.)

10. The Respondent's asserted reasons for discharging Svoboda

Svoboda's credible testimony revealed that Alons informed him that he had been discharged on the basis of his Linejunk Facebook post. He testified that when being informed of his discharge, Alons told him it was brought to his attention that he "still had some harsh feelings with the cooperative and that [he'd] aired them on Facebook, and they had policies in effect. Alons did not deny those statements to Svoboda, and despite the fact that he was somewhat evasive when being questioned on that issue, he subsequently acknowledged that when he discharged Svoboda, he told Svoboda his Facebook post was brought to his attention, it was all negative, and he had made the post in a forum he knew his coworkers were on. (Tr. 175.)

Haak's testimony similarly revealed that Svoboda was informed that he was discharged because of his Facebook post. In that connection, Haak testified that his sworn statement in his affidavit provided during the investigation of this case, was true and accurate, which stated in relevant part:

> Alons told Svoboda about the Facebook Post that had been brought to our attention and that we had read it…. I think it was obvious to the crew that Svoboda was referring to the employer in his Facebook post, which was all negative. He also made a post in a forum that he knew his coworkers were on. This was relayed to Svoboda during the termination by Alons. (Tr. 205–207.)

In addition, as mentioned above, Korver's memorandum pertaining to his conversation with Alons on December 5 and the termination meeting Alons and Haak had with Svoboda on December 8, reflects that Svoboda was informed that his discharge was based on his Facebook post. In the memo, Korver stated that Alons was made aware of "a social media post by Dave" that was "negative to the Cooperative and to some of the line crew." (R. Exh. 1.) The memo further stated that Alons and Haak met with Svoboda on December 8 and "mentioned that it had come to their attention that Dave had made a negative post on social media and this was another demonstration of Dave's bad attitude toward the Cooperative and his fellow employees and it causes conflict and mistrust." (R. Exh. 1.)

Kover testified however, that his decision to discharge Svoboda was not based on the fact that he made the Facebook post. (Tr. 285.) Instead, he testified that he had to discharge Svoboda because he "couldn't accept the risk safety-wise and with the inefficiency … it was going to cost … our organization." (Tr. 285.) He went on to testify that continuing to employ Svobada "would adversely impact [Respondent's] work environment if [it] kept him employed." (Tr. 285–286.) When asked to elaborate on that statement, Korver testified:

> Crew members not wanting to work with him, so we would have to be changing work schedules that was going to affect our efficiencies, but the big thing was what that could do safety-wise when you got guys that don't want to work with somebody, there's not a trust there. There's conflict. I can't accept that responsibility as a manager to have – to not do something about that and then have something occur and I didn't do something about it. (Tr. 286.)

Korver's testimony that he had to discharge Svoboda because he would have to change all the linemen's work schedules and it would affect safety differs from the reasons for discharge set forth in his memorandum and the reasons conveyed to Svoboda at the time of his discharge. Those reasons for discharging Svoboda (because of changing work schedules and safety concerns) were also items that Korver failed to mention as reasons for Svoboda's discharge in his sworn affidavit provided to the NLRB Regional Office during its investigation of the charge in this case. (Tr. 294–297.)

11. The credibility determinations

While the operative facts of this case are essentially undisputed and do not require determinations with regard to credibility, the particular point of Korver's testimony regarding the reason Svoboda was discharged warrants evaluation as it conflicts with the record and it is relied on by the Respondent as a purported independent basis for Svoboda's discharge. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

My observation during the trial was that Svoboda appeared sincere and honest in his demeanor, and he testified in a clear, convincing, and straightforward manner. His testimony that the Respondent discharged him because of his Facebook post was

not only credible, it was corroborated by the testimony of Respondent witnesses Alons and Haak, and by Korver's memorandum stating that Svoboda was told he was discharged for his Facebook post that was negative to the company. Korver, on the other hand, testified in a less convincing manner, and in particular, he presented testimony that was at times guarded and defensive. I specifically do not credit Korver's testimony that having to change work schedules and safety concerns were bases for the discharge. As mentioned above, that testimony was not supported by the record, and it was contradicted by the testimonies of Alons and Haak, and his own memo documenting Svoboda's discharge. Critically, Korver also failed to present his asserted reasons of changing schedules and safety concerns in his affidavit to the Region, which further undermines the veracity of his assertions. Thus, in instances where the testimonies of Respondent's witnesses, and in particular that of Korver, differ from that of Svoboda's, I credit Svoboda's testimony.

### *B. The Contentions of the Parties*

The General Counsel argues that the Respondent's discharge of Svoboda violated the Act essentially under three theories: (1) he was engaged in protected concerted activity in posting his comments in response to the safety conversation starter on the Linejunk Facebook page; (2) that discussions about safety in the lineman industry are "inherently concerted;" and (3) even assuming Svoboda was not engaged in concerted activity, he was discharged pursuant to overbroad rules concerning conduct (Policy Nos. C-6 and C-9).

The Respondent, on the other hand, argues that Svoboda was not discharged because of his post on the Linejunk Facebook page, but instead "because of his continued inability to get along with his coworkers," which was not protected by the Act.[11] (R. Br. p. 13.) Respondent further contends that even if Svoboda was discharged for his Facebook post, he was not engaged in concerted activity under the traditional *Meyers* test. Instead, the Respondent argues that the post was "nothing more than unprotected griping, unrelated to group activity," and his coworkers who testified at the hearing in this matter "stated that they disagreed with the content of his posts." (R. Br. pp. 13–15.) The Respondent also contends that the Linejunk Facebook post was not "inherently" concerted activity because the Board has only extended that theory to conversations about wages and job security. (R. Br. p. 20.) Finally, the Respondent argues that Conduct Policies C-6 and C-9 are not overly broad, and even if they were, Svoboda's termination was lawful because he was discharged for his "habitual inability to get along with his coworkers." (R. Br. pp. 16, 19.)

### *C. Analysis*

#### 1. Svoboda engaged in concerted activity for the purpose of mutual aid or protection, and the Respondent discharged him because of that activity, in violation of Section 8(a)(1) of the Act

##### *a. The legal precedent*

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7, the cornerstone of the Act, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Employees thus have a statutory right under Section 7 to act together "to improve terms and conditions of employment or otherwise improve their lot as employees." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), end. 358 Fed. Appx. 783 (9th Cir. 2009). The Board has held that such a right includes employees' use of "social media to communicate with each other and with the public for that purpose." *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), affirmed, 629 Fed. Appx. 33 (2d Cir. 2015). The Act accordingly prohibits employers from discharging employees for exercising their organization and collective-bargaining rights, including their right to engage in concerted activities for the purpose of mutual aid or protection. See *MCPC Inc. v. NLRB*, 813 F.3d 475, 479 (3rd Cir. 2016).

The Board has held that an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection" for it to be protected under Section 7 of the Act. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). The Supreme Court, however, has held that Congress did not intend to limit the protection of Section 7 of the Act to situations "in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984). The Supreme Court has recognized that the concept of "mutual aid or protection" concerns "…the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy Neighborhood Market*, supra at 153, citing *Eastex*, supra at 565. The "concertedness" and "mutual aid or protection" elements under Section 7 are analyzed under an objective standard, whereby motive for taking the action is not relevant to whether it was concerted, nor is motive relevant to whether it was for "mutual aid or protection." *Fresh & Easy Neighborhood Market*, supra, at 153. The analysis instead focuses on "…whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." (Id.)

##### *b. Svoboda's post on Facebook was for the purpose of mutual aid or protection.*

In this case, it is undisputed that Svoboda was involved in a Facebook discussion seeking input on how accidents in the lineman industry could be stopped or prevented (i.e. "how we can stop all the accidents" in lineman work), and the content of his post in reply to that inquiry clearly concerned the protected

[11] In that connection, the Respondent asserts that Svoboda was discharged "because he had been warned multiple times about his inability to work with his team, and immediately after his posts every one of his immediate coworkers told Respondent's management that they would no longer work with him" and thus, even if the posts were protected his termination was not unlawful. (R. Br. p. 23.)

topic of lineman safety and accident prevention. When Svoboda posted his comments on the Linejunk Facebook page, he was addressing his workplace health and safety concerns. His comments, without naming the Respondent or its managers, were critical of some of Respondent's safety practices and safety training, and therefore directly concerned improving his and his coworkers' terms and conditions of employment. See *Daniel Construction Co.*, 277 NLRB 795 (1985) (employees' work stoppage found to be "plainly protected" where it concerned "uncomfortable, potentially health-threatening working conditions"). Any contention by the Respondent that Svoboda's Facebook post was merely unprotected "griping," and somehow did not involve workplace safety or health concerns, is simply not supported by the record. In fact, Koele, one of the lineman crew members called by Respondent to testify, acknowledged that Svoboda's Facebook post concerned workplace safety, and that it contained Svoboda's "characterization of safety practices." (Tr. 349; 355–356.)

The record also establishes that Svoboda's Facebook comments were nothing new to his managers, and in fact, his comments were a continuation of safety concerns he had previously shared with some of his supervisors and coworkers. In his Facebook post, Svoboda recounts how he brought certain safety issues to management's attention to no avail—such as the use of three-man crews instead of six-man crews; the fact that apprentice linemen needed more time in the air (in the bucket) and needed training to be aware of what the linemen were doing in the air, and his belief that many accidents occur when there are an insufficient number of linemen on the ground to help the lineman in the bucket. It is undisputed that prior to his Facebook post, Svoboda had specifically talked about accidents involving one lineman in the air and either none or just a few stationed on the ground. (Tr. 55–56.) He also specifically raised safety concerns in daily work conversations and after the Respondent's safety meetings. (Tr. 55.) Svoboda also specifically discussed those safety concerns with Alons, as evinced by the fact that, when Svoboda was being escorted to his locker after his discharge, Alons acknowledged that Svoboda's Facebook post did not include any information which he had not already raised with the Respondent.

Besides commenting on his and his coworkers' terms and conditions of employment for the purposes of mutual aid or protection, the record also establishes that Svoboda's Facebook comments concerned a discussion regarding the safety of employees of other employers in the industry, and they were aimed at improving industry-wide safety for all linemen who viewed the Facebook post. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court held that attempts to improve the terms and conditions of employment for other employer's employees are within the broader purpose of "mutual aid or protection" under the Act, as well as for the narrower purposes of "self-organization" and "collective bargaining." In *Eastex,* the Court noted that the "employees" who may engage in concerted activities for purposes of "mutual aid or protection" are defined by Section 2(3) of the Act to "include any employee, and shall not be limited to employees of a particular employer…." (Id. at 564.) The Court thus held that "[t]his definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own," and that the "mutual aid or protection" clause encompasses such activities. (Id.) In that case, the Court determined that the distribution of a union newsletter by employees to nonworking unit employees in nonworking areas, encouraging them to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution, and criticizing a presidential veto of federal minimum wage increases and urging readers to vote for labor-friendly political candidates, involved mutual aid or protection. (Id. at 556.) The Court found that the newsletter advocating a raise in the minimum wage involved mutual aid or protection, even though employees of the respondent were already paid far above the proposed minimum, based on the "widely recognized impact that a rise in the minimum wage may have on the level of negotiated wages generally." (Id. at 565–567; 569–570.) Thus, in *Eastex*, the Court held that employees are protected by the Act when they seek to improve their terms and conditions of employment or improve their lot as employees "through channels outside the immediate employee-employer relationship."

In this case, Svoboda's efforts to address workplace health and safety concerns and to improve the terms and conditions of his employment, as well as that of all employees in the industry, clearly concerned matters of "mutual aid or protection" of the Respondent's employees and of employees generally. *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975) (employees' complaints protesting supervisory handling of safety and training issues fell within the scope of the "mutual aid or protection" clause). Accordingly, Svoboda's Facebook post constituted protected activity under the Act. *Eastex*, supra; *Reliant Energy, LLC*, 357 NLRB 2098, 2100 fn. 19 (2011); See *Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974) (employee "seeking to enlist the aid of his fellow employees to support employees of other employers who were on strike and to oppose an alleged antilabor combination...[was]…a protected concerted activity for mutual aid and protection under Section 7.") See also, *Washington State Service Employees State Council No. 18 and Local 6, Service Employees Union*, 188 NLRB 957, 958–959 (1971).

*c. Svoboda's Facebook post constituted concerted activity*

Besides constituting protected activity, there is a question of whether Svoboda was engaged in concerted activity when making his Facebook post. While the Respondent contends that Svoboda was not discharged because of his post on the Linejunk Facebook page, but instead because of "his continued inability to get along with his coworkers," it nevertheless argues that even if he was discharged for his Facebook post, he was not "trying to initiate, induce or prepare for any group action…and his posts were not protected concerted activity under the traditional *Meyers* test. (R. Br. pp. 13–15.) In support of its position, the Respondent asserts that the Facebook post was "unrelated to group activity," and that Svoboda's coworkers who testified at the hearing "disagreed with the content of his posts." (R. Br. pp. 13–15.) For the reasons stated below, I find that the Respondent's arguments lack merit, and that Svoboda was engaged in protected concerted activity.

As mentioned above, the Board has held that an employee's

conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection" for it to be protected under Section 7 of the Act. *Fresh & Easy Neighborhood Market*, supra, at 153. The Board defined concerted activity in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), as activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board clarified that definition of concerted activity in *Meyers II*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), to include cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." (Id. at 887.)

In this case, Svoboda's albeit single and individual action in his Facebook post sought to bring to the attention of all those who viewed the Facebook question of what can be done to prevent accidents, his concerns with regard to health and safety in his workplace and in the industry in general. He set forth is concerns, without identifying the Respondent or its managers, in a group discussion viewed by some of his coworkers whom he knew were members of the Linejunk community. In fact, Svoboda testified that Facebook notified him that some of his coworkers followed the Linejunk page. Furthermore, Svoboda's comments in his post were the same as those he had previously raised with his managers and coworkers. I find that since Svoboda raised his workplace safety concerns in a group forum that included some of his coworkers, his comments were intended, at least in part, "to initiate or to induce or to prepare for group action" in support of his position on those safety issues that he previously raised with management.

Even if Svoboda lacked a concrete plan for subsequent group action, his Facebook post nevertheless constituted concerted activity. The Board held in *Fresh & Easy Neighborhood Market*, supra, at 153, the requirement that activity, to be concerted, must be engaged in with the object of initiating or inducing group action, "does not disqualify merely preliminary discussion from protection under Section 7." In that regard, the Board noted that:

> [I]nasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. *Fresh & Easy Neighborhood Market*, supra, at 153, quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)

In addition, the Board has held that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group action." *Fresh & Easy Neighborhood Market*, supra at 153; *Whittaker Corp.*, 289 NLRB 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)

The fact that some of Svoboda's coworkers testified at the hearing that they disagreed with the content of his Facebook post, and subsequently reported his comments to management, does not diminish or negate the concerted nature of Svoboda's comments. What Svoboda's fellow employees may have thought about his motives has little bearing on whether his activity was concerted. *Circle K Corp.*, 305 NLRB 932, 933 (1991). Under Board precedent, concertedness "…is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed." *Fresh & Easy Neighborhood Market*, supra at 153; see e.g., *El Gran Combo*, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988); and *Meyers II*, 281 NLRB at 887. The Board has held that it is "…well established that an employee may act partly from selfish motivations and still be engaged in concerted activity, even if [the employee] is the only immediate beneficiary of the solicitation." (Id. 153); See also *Circle K Corp*., supra at 933. Furthermore, the Board has held that "[w]here an employee's objectives in taking certain action may be mixed, and one supports a finding of concertedness, [the Board] may not ignore it in favor of one that does not." (Id. 153); *Circle K Corp.*, supra at 934 fn. 9. Based on that legal precedent, Svoboda's coworkers did not have to agree with him or join his cause in order for his activity to be concerted, nor did his coworkers have to share an interest in the matter raised by Svoboda in the post for the activity to be concerted. (Id. at 154.)

Finally, even though Respondent elicited testimony about some of Svoboda's allegedly unsafe work practices, thereby suggesting that the content of his Facebook post was disingenuous or without basis, I find that such evidence is irrelevant and immaterial. As the Board held in *Fresh & Easy Neighborhood Market*, supra, an employee "…may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one." *Fresh & Easy Neighborhood Market*, supra, at 153; *Circle K Corp*., supra at 933. In addition, "…the protected, concerted nature of an employee's complaint to management is not dependent on the merit of such a complaint." (Id. at 154); See also *Spinoza, Inc*., 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973). Thus, Svoboda's Facebook comments on safety and the lack of safety training established concerted activity, regardless of whether his coworkers agreed with his comments, or whether his comments on safety practices and accident prevention actually had merit.

Further evidence that Svoboda's comments constituted concerted activity can be found in the fact that Svoboda's comments were part of, and in response to, a group discussion of employees on Facebook regarding what could be done to prevent accidents in the lineman profession.[12] The Supreme Court

[12] While the record does not identify the individual who posted the question or the other Facebook users who participated in or viewed the safety discussion, or whether they were statutory employees under the Act, based on the context of the discussion and the nature of the Linejunk Facebook page, I find it is reasonable and plausible to infer that at least some of the approximately 77 Facebook users who "liked" the Linejunk post, the approximately 100 or more individuals who participated in the discussion, or the tens of thousands who followed the Linejunk Facebook page, were employed as non-supervisory linemen and statutory employees within the meaning of the Act. In addition, the record established that at least some of Respondent's statutory

recognized in *Eastex*, supra, that the concept of "mutual aid or protection" concerns "…the goal of concerted activity," which essentially is "…whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Eastex,* supra at 565; *Fresh & Easy Neighborhood Market*, supra at 153. The Court held that the "employees" who may engage in concerted activities are not limited to employees of a particular employer, and include employees of employers other than their own. *Eastex*, supra at 564. Accordingly, the Board has held that statutory employees employed by different employers may join together to engage in concerted activities. See *Reliant Energy, LLC*, supra; *Yellow Cab, Inc*., supra at 569; See also, *Washington State Service Employees*, supra at 958–959 (employee found to have engaged in concerted activity by attending and participating in a rally with employees of other employers). In this case, Svoboda's group Facebook discussion with statutory employees of other employers was aimed at improving the terms and conditions for all employees in the industry, and it clearly constituted concerted activity. See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 308–309, 312–313 (2014) (employees engaged in protected concerted activity by taking part in a Facebook discussion about employer's tax withholding practices).

*d. Even if Svoboda was not engaged in concerted activity, his discussion about safety in the lineman industry was "inherently concerted," and as such was protected*

In addition to arguing that Svoboda's comments involved group action and thus traditional concerted activity, the General Counsel contends that his discussion of workplace safety was also protected under the Board's doctrine of "inherently concerted activity." The Respondent, on the other hand, contends that the Facebook post was not "inherently" concerted activity because the Board has only thus far extended that theory to conversations about wages and job security. (R. Br. p. 20.) For the reasons set forth below, I find merit to the General Counsel's arguments.

The Board has historically applied the doctrine of "inherently concerted" activity to wage discussions, and as such has found them to be protected, regardless of whether they are engaged in with the express object of inducing group action. *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 fn. 10 (2014); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Scientific-Atlanta, Inc*., 278 NLRB 622, 624–625 (1986). The rationale for finding wage discussions inherently concerted is that wages are a "vital term and condition of employment," the "grist on which concerted activity feeds," and such discussions are often preliminary to organizing or other action for mutual aid or protection. *Alternative Energy Applications, Inc.*, supra 1206 fn. 10; *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (citations omitted), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996); See also *Trayco of S.C. Inc.*, 297 NLRB 630, 634–635 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991) (found contemplation of group action is not required when employee discussion concerns wages); *Whittaker Corp*., 289 NLRB 933, 933 (1988) (with respect to wage discussions, "object of inducing group action need not be express").

In *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1, fn. 1 (2015), incorporating by reference 359 NLRB 355 (2012), the Board applied the doctrine of "inherently concerted" activity to discussions about job security. In doing so, the Board held that its rationale for finding discussions of wages inherently concerted "applies with equal force to conversations about job security." Id. In that regard, the Board noted that job security, like wages, is a vital term and condition of employment and the "grist on which concerted activity feeds." (Id.); *Aroostook County Regional Ophthalmology Center*, supra; see also *Triana Industries*, 245 NLRB 1258, 1258 (1979). In *Hoodview Vending Co*., while the Board declined to address "other possible topics of conversation" that might also be found "inherently concerted," it also did not rule out the possibility that other topics of conversation might be included in the "inherently concerted" category.

It is undisputed that lineman work is inherently dangerous work which could result in serious injury, or even death, and therefore workplace health and safety is likely one of the most important concerns to employees in that profession. The same could be said for all professions, as health and safety matters regarding unit employees in general have been observed by the Board to be of vital interest to employees, and it has held that "[f]ew matters can be of greater legitimate concern to individuals in the workplace…than exposure to conditions potentially threatening their health, well-being, or their very lives." *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995) (confirming the relevancy of a union's request for information addressing health and safety issues). As workplace health and safety unquestionably has a vital effect on terms and conditions of employment, the Board's rationale for finding discussions of wages and job security inherently concerted would be equally applicable to conversations about workplace health and safety, such as those set forth by Svoboda in his Facebook post in this case. Health and safety concerns are also "grist on which concerted activity feeds," and such discussions are often "preliminary to organizing or other action for mutual aid or protection." Accordingly, I find that Svoboda's Facebook comments about safety in the lineman industry were "inherently concerted," consistent with the Board's legal theories discussed above, and as such, were protected regardless of whether they were made with the express object of inducing group action. *Alternative Energy Applications, Inc.*, supra; *Hoodview Vending*, supra.

*e. Svoboda's Facebook post did not exceed the bounds of protection provided by Section 7 of the Act*

Having found that Svoboda was engaged in protected concerted activities, I must next determine whether his comments or conduct exceeded the bounds of that protected concerted activity so that it would remove the protection of the Act. While the Respondent argues in its posthearing brief that Svoboda was not discharged on the basis of his Facebook post, the evidence establishes that the Respondent's managers informed

employees participated in or viewed the discussion at issue in this case, and subsequently presented the post to the Respondent's managers.

him that he was, in fact, discharged for his Facebook post which they characterized as "negative" towards the Respondent. Even though Svoboda was told that he was discharged for his Facebook comments that were "negative" to the company, it is unclear from the record whether the Respondent is asserting that the post was in some way offensive or indefensible conduct that exceeded the bounds of protection, or whether it in some way was a public attack on the Respondent's work or business practices. In either case, there is no evidence to establish that Svoboda's comments were sufficient to remove his protected concerted activity from the protection of the Act under any of the applicable legal standards.

It is well established that although employees are permitted some leeway for impulsive behavior when engaged in protected activity, this leeway is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994); *Tampa Tribune*, 351 NLRB 1324, 1325–1326 (2007). When an employee engages in abusive or indefensible misconduct during activity that is otherwise protected, the employee forfeits the Act's protection. *DaimlerChrysler Corp*., 344 NLRB 1324, 1329 (2005). The Board has held that the standard is high for forfeiting the protection of the Act, stating that protected conduct must be egregious or offensive to lose the protection it is provided. *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000) (citations omitted), enfd. 263 F.3d 345 (4th Cir. 2001). In this regard, the Board has determined that "the manner in which an employee exercises a statutory right must be extreme to be beyond the Act's protection." (Id.) See also *Trus Joist Macmillian*, 341 NRLB 369, 371 (2004).

In *Atlantic Steel Co.*, 245 NLRB 814 (1979), the Board set forth the test for determining whether an employee loses the protection of the Act. Under that test, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices." (Id. at 816.) This multifactor framework enables the Board to balance employee rights with the employer's interest in maintaining order in its workplace. *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014); See *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), enfd. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB 972 (2014). However, in analyzing whether Svoboda's posted comments on social media were sufficiently egregious to lose the protection of the Act, I note that the Board has found the *Atlantic Steel* framework discussed above is "tailored to workplace confrontations with the employer," and is "not well suited to address issues that arise in cases…involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties." *Triple Play Sports Bar & Grille*, supra at 310. Instead, the Board has found in *Pier Sixty, LLC,* 362 NLRB No. 59 (2015), that the analysis to be applied in offsite, off-duty use of social media cases is a totality of the circumstances test, which considers the following nine factors:

> (1) Whether the record contained any evidence of the Respondent's antiunion hostility; (2) whether the Respondent provoked [the employee's] conduct; (3) whether [the employee's] conduct was impulsive or deliberate; (4) the location of [the employee's] Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the Respondent considered language similar to that used by [the employee] to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon [the employee] was typical of that imposed for similar violations or disproportionate to his offense. Id.

Besides the Respondent's vague assertions that Svoboda's comments were "negative" to the Cooperative, it offered no credible evidence that his comments were so offensive, abusive or indefensible that they exceeded the bounds of protected concerted activity. Svoboda's comments were critical of some of the Respondent's work safety practices and safety training, but they did not identify the Respondent or any of its employees, and they were not abusive or threatening. There is likewise no evidence that there was conduct by Svoboda accompanying his posted comments which would have caused him to lose the protection of the Act.

In determining whether Svoboda's posted comments on social media were so egregious as to exceed the Act's protection, an analysis of the "totality of the circumstances" factors establishes that Svoboda's comments did not exceed the bounds of protection. The record reveals that the first factor, whether the Respondent displayed hostility towards Svoboda's protected conduct, weighs in favor of protection because the Respondent's managers informed him that he was discharged for engaging in protected activity, thus evincing hostility. With regard to the second factor of provocation, the post does reveal that Svoboda had brought those same safety concerns to the Respondent prior to his post, but to no avail. I find it reasonable to conclude that Svobada was likely frustrated by that fact, and to that extent, was likely provoked to some degree in making his comments about Respondent's workplace safety conditions and practices, thus favoring protection. With regard to the third factor of whether the conduct was impulsive or deliberate, Svoboda's comments appear to have been a deliberate response to a safety question about how workplace accidents for lineman could be prevented. With regard to the fourth and fifth factors, the location and the subject matter of the Facebook post, the posting was not made at work and there is no evidence that it identified the Respondent or affected its ability to provide its services to the public. There is therefore no evidence that the post impacted Respondent's relationship with its customers or affected its ability to provide services to its customers. *Pier Sixty*, supra slip op. at 3, fn. 6, citing *Restaurant Horikawa*, 260 NLRB 197, 197–198 (1982). Therefore, the fourth and fifth factors weigh in favor of protection. With regard to the nature of the post (factor six) and whether Respondent considered language similar to that used by Svoboda to be offensive (factor seven), I find those factors both weigh in favor of protection. While the nature of the posted language was critical of Respondent's safety practices and training for apprentices, it did not contain profanity or threats. In fact, the evidence establishes that the post contained comments on safety that Svoboda had already raised with the Respondent's managers. In such a set-

ting, Svoboda's comments in his Facebook post would not cause him to lose the protection of Section 7. *Pier Sixty*, slip op. at 3. With regard to whether Respondent maintained a rule prohibiting the language used by Svoboda (factor 8), the evidence weighs in favor of protection because comments on working conditions were not prohibited in any of Respondent's Conduct Rules. In addition, the factor of whether the discipline imposed was typical of that imposed for similar infractions (factor 9) also weighs in favor of finding the comments protected, as the evidence in this case does not establish that social media comments had previously resulted in discharge for employees.

Based on an objective review of the evidence under the foregoing totality of the circumstances standard, the factors are in favor of retaining the protection of the Act. Accordingly, I find that Svoboda's comments about Respondent's safety and training practices in the Facebook post were not so egregious as to take him outside the protection of the Act.

If in fact the Respondent, by telling Svoboda he was discharged because his Facebook comments were "negative" to the company, was inferring that his discharge was based on disloyal or disparaging comments, I find that such an allegation is similarly unsupported by the record and extant case law. The Board has held that allegations regarding disparaging communications by employees with third parties or the general public that lose protection of the Act are analyzed under the standards established in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966). In *Jefferson Standard*, supra, the Supreme Court held that employees who publically attacked the quality of their employer's product and its business practices without relating their criticism to a labor controversy were not discharged in violation of the Act. In that case, the Court found the employees' conduct amounted to disloyal disparagement of their employer, and as such, exceeded the bounds of the Act's protection. 346 U.S. at 475–477. In *Linn*, supra, the Court limited remedies under state law for defamation occurring in union organizing campaigns "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U.S. at 64–65. For such purposes, the Court determined the meaning of "malice" was the comment was made "with knowledge of its falsity, or with reckless disregard of whether it was true of false." (Id. at 61.) The Board, in applying these principles, has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not disloyal, reckless, or maliciously untrue as to lose the Act's protection.'" *Triple Play Sports Bar & Grille*, supra, at 312; *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)).

Svoboda's Facebook comments at issue in this case are distinguishable from the disparaging communications in the *Jefferson Standard* case that lost the protection of the Act. Similar to an ongoing labor dispute, the comments in this case involved an ongoing Facebook discussion involving lineman terms and conditions of employment such as workplace health and safety and ways in which lineman accidents could be prevented. In addition, even though Svoboda's comments, were made in a forum which included some of Respondent's employees, employees of other employers, and the public, they never identified the Respondent, its managers, or its employees. Therefore, Svoboda's comments were not "so disloyal…as to lose the Act's protection" under *Jefferson Standard*, because they did not mention Respondent's name or disparage the Respondent or its services. Instead, the purpose of his comments were to seek and provide mutual support toward group action encouraging the Respondent and other lineman industry employers, to address problems in terms and conditions of employment such as safety and safety training, not to disparage the Respondent or undermine its reputation. As such, his comments were protected. *Triple Play Sports Bar & Grille*, supra, at 312.

In addition, Svoboda's comments were not defamatory under the standard set forth in *Linn*, because the Respondent failed to present evidence establishing that the comments were maliciously untrue (i.e. were made with knowledge of their falsity or with reckless disregard for their truth or falsity). *Triple Play Sports Bar & Grille*, supra, at 313. Svoboda's characterization of Respondent's safety practices and safety training cannot be read as a statement of fact; rather, he was voicing a critical personal opinion of some of Respondent's safety practices and safety training in his workplace and in the lineman's workplace in general. Those comments therefore did not exceed the bounds of protection as established under *Linn*. *Triple Play Sports Bar & Grille*, supra, at 313. Accordingly, I find that Svoboda's comments about Respondent's safety and training practices in his Facebook post were not so egregious as to take him outside the protection of the Act.

*f. Svoboda was discharged on the basis of his protected concerted activity, in violation of Section 8(a)(1) of the Act*

In analyzing this allegation, I note that where an employer argues that it discharged an employee for reasons unrelated to his protected activity, such as tardiness, poor work performance, or as in this case, "because of his continued inability to get along with his coworkers,"[13] the Board and the courts rely on the so-called "mixed motive" or "dual motive" discharge test set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); See also *MCPC Inc. v. NLRB*, 813 F.3d 475, 490 (3d Cir. Feb. 12, 2016). In *Wright Line*, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) of the Act turning on employer motivation. Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's adverse action. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011); *Donaldson Bros. Ready Mix, Inc*.,

[13] See R. Br. p. 13.

341 NLRB 958, 961 (2004).

The General Counsel satisfies the initial burden under *Wright Line* by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) animus against that activity on the part of the employer. *Mesker Door*, supra at 592 fn. 5; *Donaldson Bros. Ready Mix,* supra at 961; (2004); *North Fork Service Joint Ventures*, 346 NLRB 1025, 1026 (2006); *Willamette Industries*, 341 NLRB 560, 562 (2004); See also *DHL Express (USA), Inc.*, 360 NLRB 730 (2014). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Mesker Door*, supra; See *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). As support for an inference of unlawful motivation, the Board may rely on, among other factors, disparate treatment of the affected employee and the timing of the discipline relative to the employee's protected activity. *Mesker Door*, supra; See *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). In addition, the Board may infer animus against protected activities from pretextual reasons given for the adverse employment action. *DHL Express*, supra, 730 and fn. 1 (2014).

On such a showing, the burden shifts to the employer to prove that it would have taken the adverse action even in the absence of the employee's protected conduct. *Lucky Cab Co.*, 360 NLRB 271, 276 (2014); *Austal USA, LLC*, 356 NLRB 363, 364 (2010). This burden may not be satisfied by an employer's proffered reasons that are found to be pretextual, (i.e. false reasons or reasons not in fact relied upon for the adverse employment action). Rather, it is well established that a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Lucky Cab Co*., supra, at 276; *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012). In addition, it is apparent that the employer does not sustain its burden by simply showing that a legitimate reason for the action existed. As the Board stated in *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984):

> We have held that the burden shifted to an employer under *Wright Line* is one of persuasion, and affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found. See *Wright Line*, 251 NLRB at 1088 fn. 11; *Bronco Wine Co*., 256 NLRB 53 (1981); *Rikal West, Inc.*, 266 NLRB 551 (1983). Cf. *Magnesium Casting Co*., 259 NLRB 419 (1981).

Therefore, in rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the employer's decision, the employer cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

Based on the record evidence, I find that an analysis under *Wright Line* demonstrates that Svoboda's discharge was discriminatorily motivated.

i. The General Counsel made a prima facie case of discrimination

First, the General Counsel has made a prima facie showing that Svoboda's protected conduct was a "motivating factor" in the Respondent's decision to discharge him. In fact, the undisputed evidence establishes that Respondent's managers admitted that Svoboda's protected Facebook activity was at least one of the reasons he was discharged. There is no question that Respondent was aware of Svoboda's Facebook comments because its managers informed him when he was discharged that they had read his Facebook post, and it was negative towards the Respondent. There is likewise no question that Respondent harbored animus toward Svoboda's protected concerted Facebook comments critical of its safety practices and training because they essentially informed him of such when they discharged him.

On such a showing, the burden shifts to the Respondent to demonstrate that Svoboda would have been discharged even in the absence of the protected conduct. As mentioned above, the burden is not sustained by showing a legitimate reason for the discharge existed, but instead the Respondent must demonstrate by a preponderance of the evidence that he would have been discharged even in the absence of his protected conduct. *Roure Bertrand Dupont, Inc.*, supra. For the reasons set forth below, I find the record establishes that the Respondent's asserted reasons are pretext for its unlawful motivation, and that the Respondent has not carried that burden.

ii. The Respondent's asserted reasons for Svoboda's discharge are without merit and are pretext for its unlawful motivation.

The Respondent asserts that Svoboda was discharged "because of his continued inability to get along with his coworkers," and not because of his post on the Linejunk Facebook page. (R. Br. pp. 13, 19.) In that connection, it asserts that Svoboda was discharged "because he had been warned multiple times about his inability to work with his team, and immediately after his posts every one of his immediate coworkers told Respondent's management that they would no longer work with him" and thus, even if the posts were protected, his termination was not unlawful. (R. Br. p. 23.)

The Respondent's assertion that Svoboda was discharged based on an alleged inability to get along with his coworkers is not supported by the record, which instead establishes that Svoboda had been discharged on the basis of his Linejunk Facebook post. Svoboda credibly testified that when Alons discharged him, he said it was brought to his attention that he (Svoboda) "still had some harsh feelings with the cooperative and that [he'd] aired them on Facebook, and they had policies in effect." Respondent's assertion is also contradicted by the testimony of its own witnesses. Despite the fact that Alons was evasive when questioned on that issue, he subsequently acknowledged that when he discharged Svoboda, he told him the Facebook post was brought to his attention, it was all negative, and he made the post in a forum he knew his coworkers were on. Haak's testimony likewise revealed Svoboda was told he was discharged because of his Facebook comments. Haak was cross-examined with his sworn statement in his affidavit, wherein he admitted that Alons relayed to Svoboda during his

discharge that "the Facebook Post … had been brought to [their] attention and that [they] read it…." and it was obvious Svoboda was referring to the employer in his comments, which were "all negative." Most importantly, Korver's memorandum pertaining to Svoboda's termination meeting reflects that Svoboda was informed his discharge was based on his Facebook post. According to Korver's memorandum, Alons was made aware of "a social media post by Dave [Svoboda]" that was "negative to the Cooperative and to some of the line crew." (R. Exh. 1.) The memorandum further stated that Alons and Haak "mentioned that it had come to their attention that [Svoboda] had made a negative post on social media and this was another demonstration of [Svoboda's] bad attitude toward the Cooperative and his fellow employees and it causes conflict and mistrust." (R. Exh. 1.)

Contrary to his statements in his memorandum, however, Korver testified that his decision to discharge Svoboda was not based on his Facebook comments, but instead on the fact that he would have to change the employees' work schedules and there was a risk "safety-wise" with continuing to employ Svoboda. Korver testified that continuing to employ Svoboda "would adversely impact [Respondent's] work environment if [it] kept him employed." (Tr. 285–286.) In elaborating on that statement, Korver testified that the crew did not want to work with Svoboda and "we would have to be changing work schedules that was going to affect our efficiencies, but the big thing was what that could do safety-wise when you got guys that don't want to work with somebody, there's not a trust there." (Tr. 286.) The Respondent failed to present any evidence to explain why Korver's testimony that Svoboda was allegedly discharged because he would have to change all the linemen's work schedules and it would affect safety, differed from the reasons for discharge set forth in his memorandum and the reasons conveyed to Svoboda at the time of his discharge—that his Facebook post was negative to the company. In addition, the reasons for discharging Svoboda based on changing work schedules and alleged safety concerns were important factors the Respondent failed to allege as an affirmative defense in its answer to the complaint, and they were also critical items that Korver failed to mention as reasons for Svoboda's discharge in his sworn affidavit provided to the Region during its investigation of this case.

I find that the reasons asserted for the discharge by Korver in his testimony, and by the Respondent in its brief, are not supported by the record, are not credible or plausible, and they are contradicted by the credible testimony of Svoboda and the testimonies of Respondent's own witnesses which establish he was discharged on the basis of his Facebook comments.

As mentioned above, Svoboda's testimony that the Respondent discharged him because of his Facebook post was not only credible, it was corroborated by the testimony of Alons and Haak, and by Korver's memorandum. I have specifically discredited Korver's testimony that Svoboda was discharged based on work schedules having to be changed and on alleged safety concerns. That unreliable testimony was contradicted by Alons and Haak, and by his own memorandum documenting Svoboda's discharge. In addition, I find Kover's assertions for discharge implausible. Korver was clearly the top management official responsible for making the decision to discharge Svoboda and he personally drafted the memorandum regarding the discharge. However, he failed to include any reference in the memorandum about having to change employees' work schedules or safety concerns if Svoboda continued to be employed. Likewise, Svoboda was never informed that those were the reasons he was being discharged. I simply find it implausible and unbelievable that Korver would neglect to inform Svoboda, either verbally or in writing, that changing work schedules and safety concerns were the basis for his discharge, if in fact that were true. I also find it equally implausible that he would neglect to include those reasons in his memorandum documenting the discharge if those truly were the reasons for discharge.

Finally, Korver's asserted reasons lack support in the record because at the time of his discharge, Svoboda was a Staking Technician, a non-bargaining unit position where he no longer worked with the line crew on a daily basis. In that position, he only worked with crew members approximately half of his time at work, and according to Elgersma the crew only worked with him "occasionally" and "a lot less." In fact, Koele testified that Svoboda was not part of the line crew, and he would only "sometimes" help the line crew when he did not have staking work to do. In addition, Koele recalled only working one time with Svoboda after he took the staking technician job. Thus, Korver's assertion that he would have to continually change the linemen's work schedules if he continued to employ Svoboda, when in fact Svoboda wasn't even working with the crew on a daily basis, and only "occasionally," is unsupported by the record and is implausible.

I also find Respondent's assertions in its posthearing brief that Svoboda was discharged for an inability to get along with his coworkers and because his coworkers did not want to work with him, are equally implausible, unsupported by the record, and unpersuasive. In that regard, as mentioned above, while Svoboda previously worked with a crew, after October 2015 he only worked with crew members "occasionally" or at the most, half his time at work. On that basis, Respondent's assertion that it discharged Svoboda because of an inability to get along with coworkers, when in fact he was only working with them occasionally, rings hollow and is implausible. In addition, that assertion is nonsensical. In making this argument, the Respondent would have us believe that it has provided its bargaining unit employees with the ability and authority to determine which employees they worked with, and what work those employees were to perform. It is Respondent's inherent managerial right to determine which individuals it employs, who they will work with, and what work they will be assigned. The Respondent has failed to present any evidence establishing that it entered into an agreement with the Union wherein it gave up its right to employ the workers it has chosen, assign them duties to perform, and determine with whom they will work, and that it instead vested its bargaining unit employees with that authority.

In addition, even though Respondent alleges that it discharged Svoboda because his coworkers did not want to work with him, it ignores the fact that some of his coworkers had voiced their desire to not work with him well in advance of his Facebook post. Koele requested "multiple times" not to work with Svoboda over the 3 1/2 years that he worked with him and

on approximately 15 occasions he informed his managers that he did not want to work with Svoboda. Thus, Koele's requests not to work with Svoboda occurred "long before" the Facebook post, and such requests had nothing to do with the Facebook post. I find the fact that Respondent did not discharge Svoboda until he engaged in protected concerted activity in December 2014, at a time when he no longer worked with the line crew on a regular basis, constitutes further evidence that Respondent's asserted reasons for Svoboda's discharge lack merit and are pretextual. See, e.g. *Citizens Trust Bank*, 206 NLRB 320, 324–325 (1973) (where Board found an employer's reliance on employees' excessive absences to be pretext covering its discriminatory motive for their discharges where that employer condoned the employees' absences until they engaged in a protected concerted work stoppage).

In addition, the Respondent's reliance on its employees' determinations of who they want to work with and whom they do not want to work with is seriously misplaced. That factor is immaterial to the determination of whether an employer's decision to discharge an employee was lawful. In *St. Luke's Episcopal-Presbyterian Hospitals, Inc.*, 331 NLRB 761, 762 (2000), the Board found irrelevant an employer's justification that coworkers no longer wanted to work with the discharged employee because they were angry about protected comments she made, and held that an employee's "activity does not lose the Act's protection merely because it angered her fellow employees or supervisors."[14]

I note that Board precedent further establishes that Respondent's shifting reasons for Svoboda's discharge lack merit and must be dismissed. The Board has found shifting defenses where the employer's reason for discharge offered at trial differed from what was set forth when the discharge occurred. *City Stationery, Inc.*, 342 NLRB 523, 524 (2003). The Board has also found that existence of shifting explanations or reasons for an employer's adverse employment action are persuasive evidence that the asserted reasons are pretextual and evidence of discriminatory motivation. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Naomi Knitting Plant, A Division of Andrex Industries Corp.*, 328 NLRB 1279, 1283 (1999), citing *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), enfd. 881 F.2d 542 (8th Cir. 1989). Based on extant Board law, I find that the Respondent's asserted reasons are pretextual, and the facts of this case warrant finding that the Respondent's true motive was unlawful. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *North Fork Services Joint Ventures*, 346 NLRB 1025, 1027 (2006).

Based on the above, the Respondent failed to show that it would have taken the same action against Svoboda in the absence of his protected concerted activities. Accordingly, based on the record evidence in this case and the well-established Board law discussed above, I find that the Respondent unlawfully discharged Svoboda based on his protected concerted activities, in violation of Section 8(a)(1) of the Act.

2. The Respondent coercively informed Svoboda that he was discharged for engaging in protected concerted activity, also in violation of Section 8(a)(1) of the Act

As mentioned above, it is undisputed that Svoboda was informed by the Respondent that he was discharged because of his comments in his Facebook post. The Board has made it very clear that a respondent's statement to an employee linking his or her unlawful discharge to protected activity independently violates Section 8(a)(1), separate and apart from the discharge itself. *Triple Play Sports Bar & Grille*, supra at 308 fn. 2; see also *Benesight, Inc.*, 337 NLRB 282, 283–284 (2001) (finding a statement to employee linking her unlawful discharge to her protected activity independently violated Section 8(a)(1) separate from the discharge violation). In fact, similar to the instant case, the Board held in *Triple Play Sports Bar & Grille*, supra, that an employer separately violated Section 8(a)(1) by telling the two employees it discharged that their Facebook activity was the reason for their discharges. (Id. 308 fn. 2.) Accordingly, I find that the Respondent, by Alons's statements, coercively informed Svoboda that his protected concerted Facebook activity was the basis for his discharge, which constituted a separate and distinct violation of Section 8(a)(1) of the Act.

The General Counsel did not allege in the complaint (nor did it amend the complaint at the hearing to allege) that Alons, an admitted supervisor and agent of the Respondent within the meanings of Section 2(11) and (13) of the Act, respectively, violated the Act by informing Svoboda that he was discharged for his Facebook activity. It is well established, however, that the Board may find a violation and provide a remedy for it, even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and it has been fully litigated. *Greenbrier Valley Medical Center*, 360 994, 994 fn. 2; *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

In this case, the statement to Svoboda that he was discharged for his Facebook post is closely connected to the subject matter of the complaint allegation that he was discharged because he "engaged in concerted activities for the purposes of mutual aid and protection by posting comments regarding his concerns about safety on a Facebook page…." (GC Exh. 1(e).) In fact, Alon's statement to Svoboda at the time of his discharge is not only closely connected to the subject matter of the complaint, it is undisputed evidence supporting the finding that his discharge was unlawful. I find that the matter was also fully litigated at the hearing, where the parties had ample opportunity to question and cross-examine Svoboda about what Respondent's managers told him when he was discharged. In addition, the parties had the opportunity to examine both Alons and Hack about what Svoboda was told about his discharge, and Alons even admitted to informing him that he was discharged for his Facebook comments. Thus, I find it is properly within my discretion to find this violation based on the evidence adduced at the hearing. *Greenbrier Valley Medical Center*, supra; *Pergament United Sales*, supra; *Clock Electric, Inc.*, 338 NLRB

[14] Enforcement denied, 268 F.3d 575 (8th Cir. 2001). I note that although the court reversed the Board's decision in *St. Luke's*, that case is factually distinguishable from the instant case. In this case, Svoboda's Facebook post does not mention the Respondent by name, and his Facebook post relates to Respondent's safety practices and their impact on employees, not their impact on Respondent's customers.

806, 806 fn. 1 (2003); *Hi-Tech Cable Corp*., 318 NLRB 280 (1995); *Williams Pipeline Co*., 315 NLRB 630 (1994).

3. The Respondent maintained and enforced unlawful Conduct Policies or rules in violation of Section 8(a)(1) of the Act, and even assuming Svoboda was not engaged in protected concerted activity, the Respondent discharged him pursuant to those unlawful rules, also in violation of Section 8(a)(1) of the Act

*a. The maintenance and enforcement of unlawful policies or rules*

Korver testified that Svoboda was discharged pursuant to rules concerning employee conduct (Policy Nos. C-6 and C-9). Policy C-6 addresses "Attitude, Spirit and Cooperation." It states that employees are "expected to use the [Respondent's] problem-solving procedure to resolve misunderstanding (sic) or disagreements that could otherwise affect the employees' ability to do their jobs in an efficient and positive manner…" and "employees should use the grievance procedure…when they have complaints about their working conditions…." (GC Exh. 11.) The other conduct rule at issue is Policy C-9, which addresses employees' rights to discuss or disclose certain terms and conditions of employment. That policy rule provides examples of personal conduct that may result in corrective action, including termination. One of those listed examples is "disclosure of confidential information." (GC Exh. 11.)

The General Counsel argues that Policy C-6 is unlawful because it instructs employees to resolve their complaints through its own "problem solving procedure," thereby prohibiting the use of other methods to resolve complaints, such as discussing them with each other. The General Counsel likewise contends that Policy C-9 is unlawful because the phrase "confidential information" is overly broad. The Respondent denies that either policy is unlawful.

As mentioned above, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Under Section 7 of the Act, employees have the right to engage in activity for their "mutual aid or protection," including communicating regarding their terms and conditions of employment. *Eastex*, supra. That right includes the right of employees to discuss, debate, and communicate with each other regarding their workplace terms and conditions of employment. Consequently, the Board has held that employees' concerted communications regarding matters affecting their employment with other employees, their employer's customers, or with other third parties such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990).

The Board has held that a rule violates Section 8(a)(1) of the Act if it would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). If the rule explicitly restricts activities protected by Section 7, it is unlawful. *Lutheran Heritage Village-Livonia*, supra at 646. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." (Id. at 647.) The Board, in analyzing work rules, "must give the rule a reasonable reading…," and "refrain from reading particular phrases in isolation, and… must not presume improper interference with employee rights." (Id. at 646.) In this case, it is not alleged that the rules in question were promulgated in response to union activity, or that they have been applied to restrict the exercise of Section 7 rights. However, the General Counsel argues that under the first prong of the test employees would reasonably construe the language in the policies to prohibit their Section 7 activities. For the reasons set forth below, I find merit in the General Counsel's assertions that the rules are unlawful.

Pursuant to Respondent's C-6 policy employees are expected to use the company's internal problem-solving procedure to resolve "misunderstanding[s] or disagreements that could…affect …employees' ability to do their jobs…." (GC Exh. 11.) Employees would reasonably believe that in order to comply with that rule they are to use the internal grievance procedure to resolve complaints or grievances regarding their working conditions, thereby prohibiting them from utilizing other methods to resolve such workplace issues, including discussing such issues with one another, third parties, or governmental agencies. In this case, the employees would undoubtedly reach that conclusion because the rule's applicability to their terms and conditions of employment is unmistakable. It explicitly states that "[e]mployees should use the grievance procedure…when they have complaints about their working conditions." By informing employees' that they are "expected" to use an internal procedure to resolve their complaints about working conditions, employees would reasonably construe that as proscribing them from protesting or discussing their terms and conditions of employment, which are clearly protected by Section 7. The Respondent's rule does not present accompanying language that would tend to restrict its application, and there is nothing in the rule that even arguably suggests that protected complaints about terms and conditions of employment are excluded from the broad parameters of the rule. As such, employees would reasonably conclude that the rule requires them to refrain from discussing complaints about their working conditions or engaging in certain protected communications.

In defense of Policy C-6, the Respondent argues that it would not be reasonably construed by employees to restrict Section 7 activities because the plain language does not "require" employees to exclusively use its internal problem solving procedure; instead it states that employees are "expected to" or "should" resolve complaints about their working conditions. However, in determining whether employer pronouncements violate Section 8(a)(1), the Supreme Court and the Board have recognized the assessment "must be made in the context of its labor relations setting," and "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be

more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969). In *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015), the Board held that "[w]here reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Section 7 activity for fear of running afoul of a rule whose coverage is unclear." Pronouncing that employees are "expected" to or "should" utilize its problem solving procedure for complaints about working conditions conveys a duty or obligation to use that procedure as more of a directive than a mere suggestion. In *Radisson Plaza Minneapolis*, 307 NLRB 94 (1994), enfd. 987 F.2d 1376 (8th Cir. 1993), the Board rejected an Administrative Law Judge's conclusion that maintenance of an employee handbook provision announcing that employee salaries "shouldn't be discussed with anyone but your supervisor or the Personnel Department" was lawful because the rule "was not mandatory." The Board, in rejecting the suggestion that a finding of violation was necessarily premised on "mandatory phrasing" (or subjective impact or evidence of enforcement), found instead that it must be assessed based "on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." (Id.) See also, *Heck's, Inc*., 293 NLRB 1111, 1119 (1989) (finding a rule "requesting" that employees not discuss wages was unlawful). Thus, based on established Board law, Policy C-6 is unlawful.

I find that Policy C-9 is likewise unlawful. Policy C-9, entitled "Personal Conduct," provides that "[w]here conduct does not meet expectations, corrective action, which could include termination, will take place." That policy specifically lists one example of such "…conduct that may result in corrective action or termination" is "disclosure of confidential information." An employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities. *Triple Play Sports Bar & Grille*, supra, at 314. I find that employees would reasonably believe or interpret this policy rule as proscribing any discussions about their terms and conditions of employment, such as wages, hours, and working conditions (and such as Respondent's safety practices or safety training), that the Respondent may deem to be "confidential information." The rule provides no illustrative examples to employees of what Respondent considers to be "confidential information." Therefore, I find that the term is "sufficiently imprecise" and that employees would reasonably understand it to encompass wages, hours, and other terms and conditions of employment, and "discussions and interactions protected by Section 7." (Id. at 314); *First Transit, Inc.*, 360 NLRB 619, 621 (2014) (quoting *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011); See e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 469–470 (D.C. Cir. 2007) (approving the Board's finding that a rule requiring employees to maintain "confidentiality or any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" was unlawfully overbroad), enfg. 344 NLRB 943 (2005); *Brockton Hospital v. NLRB*, 294 F.3d. 100, 106 (D.C. Cir. 2002) (approving the Board's finding that a rule prohibiting discussions of "[i]nformation concerning patients, associates, or hospital operations…except strictly in connection with hospital business" was unlawfully overbroad), enfg. 333 NLRB 1367 (2001).

Thus, I find that the Respondent's maintenance and enforcement of unlawful Conduct Policies C-6 and C-9, constituted violations of Section 8(a)(1) of the Act.

*b. Svoboda's discharge pursuant to those unlawful policies or rules constituted a violation of Section 8(a)(1) of the Act*

The Board has long held that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"). See, e.g. *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). In *Continental Group, Inc.*, 357 NLRB 409 (2011), the Board clarified the *Double Eagle* rule by holding that discipline imposed pursuant to an unlawfully overbroad rule violates the Act when an employee violates the rule by "(1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." *Continental Group, Inc.*, supra at 412. The Board made it clear that the *Double Eagle* rule is applicable to situations where an employer disciplines an employee pursuant to an overbroad rule for conduct "that touches the concerns animating Section 7" (e.g., conduct that seeks higher wages) that is protected, but not concerted. Id. In making that determination, the Board reasoned that the potential "chilling effect" on employees' exercise of their Section 7 rights is even greater in those situations. Id.

However, the Board held that an employer will avoid liability for discipline it imposes pursuant to an overbroad rule if it "…can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." Id; See also *Switchcraft, Inc.*, 241 NLRB 985 (1979), enfd. 631 F.2d 734 (7th Cir. 1980). The employer has the burden of not only asserting this affirmative defense, but also establishing that the employee's interference with the operation or production was the actual reason for the discipline. The *Double Eagle* rule thus reflects the Board's balancing of employees' Section 7 rights and employers' legitimate interests in being able to establish work rules for purposes of maintaining discipline and production. Id. at 412–413. Critically, an employer's mere citation to an overbroad rule as the basis for the discipline will be insufficient to meet its burden of proof. (Id. at 412.) Therefore, if the employer provides the employee with a reason (either oral or written) for imposing the discipline, the employer "…must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule." Id.; See e.g. *Gerry's I.G.A.*, 238 NLRB 1141, 1151 (1978), enfd. 602 F.2d 1021 (1st Cir. 1979) (holding "It is impossible, of course, for the employer…to establish [that the employee was discharged based on interference with production] when interference with work is not the reason given in the discharge letter and the discharge letter instead is in the literal language of the overly broad

rule.")

The record establishes that Svoboda was engaged in conduct clearly within the protection of Section 7 of the Act when he made his Linejunk Facebook post. Those Facebook comments constituted protected concerted conduct, and engagement in conduct that implicates the concerns underlying Section 7. The evidence also establishes that Respondent discharged him on the basis of that protected concerted activity, and pursuant to its overbroad conduct policies or rules. In this case, there is insufficient evidence that Svoboda's Facebook post interfered with his work, the work of Respondent's employees, or with Respondent's operations. His Facebook post occurred outside of work and on nonworking hours, thereby having no impact at all on his work, the work of his coworkers, or the Respondent's ability to provide services to its customers. Even assuming credit is given to Respondent's asserted basis for discharging Svoboda on the fact that his coworkers no longer wanted to work with him due to his protected Facebook comments (which I have soundly discredited and rejected), there is insufficient evidence to establish that any such interpersonal friction would have actually affected the Respondent's operations.

While the Respondent may argue that Svoboda's protected Facebook comments exhibited a "poor attitude" or that some of his coworkers who were angered by his comments no longer wanted to work with him, there is no evidence that such factors interfered with the Respondent's operation or its employees' work. As mentioned above, I find it immaterial whether the line crew wanted to work with him, as the Board has held that the subjective feelings of coworkers toward an employee's protected concerted activity are not relevant considerations in determining whether an employer's decision to discharge that employee was lawful. *St. Luke's Episcopal-Presbyterian Hospitals*, supra at 762. In addition, at the time of Svoboda's discharge, he held a non-bargaining unit position, was not interacting with the line crew on a regular basis, and was only working with them on occasion, which diminishes any argument that some of the crew members' desires not to work with him would have affected the Respondent's ability to provide services to its customers. Furthermore, and most importantly, some of Svoboda's coworkers had previously expressed a desire not to work with him well in advance of his protected Facebook post, and there is absolutely no evidence that such feels in any way affected the line crew's work or the Respondent's operation of its business. There is thus insufficient evidence to establish that any such interpersonal friction would have actually affected the Respondent's operations. See *PCC Structurals, Inc*., 330 NLRB 868, 874 fn. 23 (2000) (rejecting an employer's alleged justification for discharging an employee where, inter alia, the evidence established "mere interpersonal friction" rather than actual harassment of other employees).

Finally, even if sufficient evidence existed demonstrating that Svoboda's protected conduct interfered with the Respondent's operation, there is no evidence that such interference was the reason for his discharge, or that it was even conveyed to Svoboda as the reason for is discharge. In this regard, the Respondent failed to assert as an affirmative defense in its answer to the complaint that Svoboda's conduct allegedly interfered with its business operations. The Respondent also did not inform Svoboda, either in writing or orally, that he was being discharged on the basis of alleged interference with its operation. Instead, Respondent's managers informed him that he was being discharged on the basis of his Facebook post which it characterized as "negative" to the company.

Thus, the Respondent has not met its burden of establishing that Svoboda's protected conduct interfered with its operations, and even assuming such interference, it failed to meet its burden of showing that interference with its operations was the actual reason for the discharge. Accordingly, the Respondent's discharge of Svoboda pursuant to its unlawful policies or rules constituted a separate violation of Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. The Respondent, North West Rural Electric Cooperative is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by discharging employee David James Svoboda on December 8, 2014, because of his engagement in protected concerted activities, and for also discharging him pursuant to unlawfully maintained and enforced conduct policies or rules.
3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by coercively informing employee David James Svoboda on December 8, 2014, that he was being discharged for his protected concerted activity in his Facebook post.
4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining and enforcing at its Orange City, Iowa facility: (1) Policy No. C-6 which instructs employees to use Respondent's internal grievance procedure to resolve complaints or grievances concerning their working conditions, thereby prohibiting employees from utilizing other methods to resolve complaints or grievances, including by discussing them with other employees, third parties, or government agencies; and (2) Policy No. C-9 which prohibits the "disclosure of confidential information," there prohibiting employees from discussing complaints about their working conditions or engaging in protected communications.
5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged David James Svoboda, shall be ordered to offer him reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him. As this violation involves a cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90

NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Svoboda for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 18 a report allocating the backpay award to the appropriate calendar year for said employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall also compensate Svoboda for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent shall also be ordered to expunge from its files any and all references to the discriminatory and unlawful discharge of Svoboda, and notify him in writing that this has been done and that evidence of the discriminatory and unlawful action will not be used against him in any way.

Finally, the Respondent shall be ordered to revise or rescind Policy No. C-6 and Policy No. C-9 of its employee conduct policies. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful rule. See *Hills & Dales General Hospital*, supra, 612–613; see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated therein, the Respondent may comply with the order of rescission by reprinting Policy No. C-6 and Policy No. C-9 without the unlawful language or, in order to save the expense of reprinting the whole policy manual, it may supply its employees with policy handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded policies on adhesive backing that will correct or cover the unlawful portions of the policies or the unlawfully broad portions of the policies, until it republishes the policies without the unlawful provisions. Any copies of the conduct policies that include the unlawful policies or rules must include the inserts before being distributed to employees. *Hills & Dales General Hospital*, supra, at 613; *Guardsmark, LLC*, supra at 812 fn. 8; See also *Bettie Page Clothing*, 359 NLRB 777, 779–780 (2013).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[15]

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, North West Rural Electric Cooperative, Orange City, Iowa, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing rules or policies that require employees to resolve complaints and/or grievances about their working conditions only through its internal problem-solving procedure or grievance procedure, and maintaining and/or enforcing rules or policies that prohibit employees from the disclosure of confidential information which prohibits employees from addressing complaints, grievances, and other issues in alternate ways, or prohibits or interferes with employees' rights to discuss or otherwise disclose wages, benefits, and other terms and conditions of their employment.

(b) Discharging or otherwise discriminating against employees because they engage in protected concerted activities;

(c) Discharging or otherwise discriminating against employees pursuant to or on the basis of unlawful or overly broad employee policies or rules;

(d) Coercively informing employees that they have been discharged on the basis of their protected concerted activities;

(e) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, revise or rescind employee policies that are overbroad, ambiguous, or otherwise limit employees' rights under the National Labor Relations Act insofar as they require employees to resolve complaints and/or grievances only through Respondent's grievance procedure or prohibit employees from addressing complaints, grievances, and other issues in alternate ways (Policy C-6); and prohibit or interfere with employees' rights to discuss or otherwise disclose wages, benefits, and other terms and conditions of employment (Policy C-9).

(b) Furnish all current employees with inserts for the current employee conduct policies that: (1) advise employees that the above-mentioned unlawful policies or rules have been rescinded, or (2) provide employees with the language of revised lawful policies or rules on adhesive backing that will cover the above-mentioned policies; or (3) publish and distribute to employees policies that do not contain the above-mentioned unlawful policies or rules, or which contain or provide the language of lawful policies or rules.

(c) Within 14 days from the date of this Order, offer David James Svoboda full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make whole David James Svoboda for any loss of earnings and other benefits suffered as a result of his unlawful discharge and discrimination against him, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(e) Compensate David James Svoboda for the adverse tax consequences, if any, of receiving a lump-sum backpay award,

and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of David James Svoboda, and within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Orange City, Iowa, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2016

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce policies or rules that require you to resolve complaints and/or grievances only through our grievance procedure or prohibit you from addressing complaints, grievances, and other issues in alternate ways; or maintain and/or enforce policies or rules that prohibit or interfere with your rights to discuss or otherwise disclose wages, benefits, and other terms and conditions of your employment.

WE WILL NOT discharge or otherwise discriminate against you on the basis of, or pursuant to, unlawful, overly broad, or ambiguous employee policies or rules.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT coercively inform you that you have been discharged or otherwise discriminated against for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act, which are listed above.

WE WILL**,** within 14 days of the Board's Order, revise or rescind employee policies or rules that are unlawful, overbroad, ambiguous, or otherwise limit your rights under the National Labor Relations Act insofar as they require you to resolve complaints and/or grievances only through our grievance procedure or prohibit you from addressing complaints, grievances, or other issues in alternate ways (Policy C-6); and prohibit or interfere with your rights to discuss or otherwise disclose wages, benefits, and other terms and conditions of your employment (Policy C-9), and WE WILL advise employees in writing that we have done so and that the unlawful policies or rules will no longer be enforced.

WE WILL furnish you with inserts for your current employee conduct policies that: (1) advise you that the above-mentioned policies have been rescinded, or (2) provide you with language of lawful or revised policies on adhesive backing that will cover the above-mentioned unlawful policies; or WE WILL publish and distribute to you revised employee conduct policies that do not contain the above-mentioned unlawful policies, or provide the language of the lawful policies or rules.

WE WILL, within 14 days from the date of the Board's Order, offer David James Svoboda immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David James Svoboda whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, including any search-for-work and interim employment expenses he incurred as a result of his unlawful discharge.

WE WILL compensate David James Svoboda for the adverse tax consequences, if any, of receiving a lump-sum backpay

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharge of David James Svoboda, and WE WILL, within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

NORTH WEST RURAL ELECTRIC COOPERATIVE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-150605 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.